

## RIGHTS, RULES, AND THE STRUCTURE OF CONSTITUTIONAL ADJUDICATION: A RESPONSE TO PROFESSOR FALLON

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*Constitutional doctrine is typically rule-dependent. A viable constitutional challenge typically hinges upon the existence of a discriminatory, overbroad, improperly motivated, or otherwise invalid rule, to which the claimant has some nexus. In a prior article, Professor Adler proposed one model of constitutional adjudication that tries to make sense of rule-dependence. He argued that reviewing courts are not vindicating the personal rights of claimants, but are rather repealing or amending invalid rules. In a Commentary in this issue, Professor Fallon now puts forward a different model of constitutional adjudication, equally consistent with rule-dependence.<sup>1</sup> Fallon proposes that a reviewing court should overturn the application of a constitutionally invalid rule to a given claimant if that rule contains no valid severable subrule that covers the claimant; and he criticizes Adler's model on various counts. In this Response, Adler replies to Fallon's criticisms and, more generally, attempts to demonstrate that the Fallon Model is not supported by a variety of considerations that might seem to favor it. The Fallon Model is a better account of rule-dependence than the Adler Model only if the Fallon Model better implements constitutional norms, and Professor Fallon has not shown or even tried to show that it does.*

In my article, *Rights Against Rules*,<sup>2</sup> I advanced a descriptive claim about the structure of existing constitutional doctrine — my claim, in brief, was that constitutional doctrine is rule-dependent — and advanced a model of constitutional adjudication that was designed to be consistent with thus-structured doctrine. Professor Fallon basically concurs in my descriptive claim (although he properly notes that the claim is not universally true, and should be formulated as a claim about many, not all constitutional doctrines).<sup>3</sup> However, he vigorously criticizes my model of constitutional adjudication and espouses a strikingly different alternative.

For short, I will call my model the "Adler Model" and Fallon's the "Fallon Model." The Fallon Model is a detailed, novel, and internally coherent account of judicial review that — like mine — is consistent

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<sup>1</sup> See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*].

<sup>2</sup> Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) [hereinafter Adler, *Rights Against Rules*].

<sup>3</sup> See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1325.

with the rule-dependent cast of constitutional doctrine. Professor Fallon's Commentary, in presenting this model, and on other counts as well, is surely a large and lasting contribution to constitutional scholarship. But I think that the Commentary's defense of the Fallon Model, as against the Adler Model, is unsuccessful and at times confused. *Rights Against Rules* did not defend the Adler Model against the Fallon Model (because no such model existed at the time I wrote the piece),<sup>4</sup> but neither has Fallon managed to show in his Commentary that his own model is superior. The choice between the two is a matter of constitutional norms, and whether constitutional norms weigh in favor of the Adler Model, the Fallon Model, or the cousins of the Fallon Model presented by Dorf,<sup>5</sup> Isserles,<sup>6</sup> and Monaghan<sup>7</sup> is not a question that any of us has yet addressed.

Part I of this Response summarizes the points on which Professor Fallon and I largely agree: the rule-dependent cast of constitutional doctrine and, more specifically, the fact that rule-dependent doctrines are designed to test whether rules are legitimate ("valid") in light of underlying constitutional norms. Part II articulates the Adler Model and the Fallon Model (as I understand it). Part III surveys a variety of considerations that might be thought to count in favor of the Fallon Model, and some of which Fallon thinks do thus count: considerations such as existing Supreme Court doctrine on "facial" and "as-applied" challenges; the allegedly "personal" nature of constitutional adjudication; the alleged constitutional right not to be burdened by an invalid constitutional rule; and the ordinary account of statutory interpretation. In fact, I will claim in Part III, none of these considerations

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<sup>4</sup> This explanation for my failure, in *Rights Against Rules*, to defend the Adler Model against the Fallon Model may strike the reader as disingenuous. Why, at a minimum, did *Rights Against Rules* not defend the Adler Model against the cousins of the Fallon Model — such as those models of constitutional adjudication proposed by Professors Dorf and Monaghan — which were available at the time I wrote my article? See sources cited *infra* notes 5, 7. My answer is that *Rights Against Rules* labored to do the analytic work that must precede a cogent comparison of my model with models such as Fallon's, Dorf's, and Monaghan's: to demonstrate the rule-dependent cast of constitutional doctrine; to delineate a clear alternative to the Dorf/Fallon/Monaghan type of model; and to show that this type of model is not supported by the putative personal right protecting each constitutional claimant against the application of an invalid rule to her, because no such right exists. See *infra* pp. 1373–74, 1378–79, 1395, 1407–08, 1411–12 (further explicating the argument presented in *Rights Against Rules*).

<sup>5</sup> See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY (forthcoming Sept. 2000) (on file with the Harvard Law School Library); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

<sup>6</sup> See Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998).

<sup>7</sup> See Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195; Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).



really helps the Fallon Model very much. In particular, the Fallon Model does not vindicate the "personal rights" of constitutional claimants any more than the Adler Model does. In claiming the contrary, Fallon fails to address the lengthy arguments I have presented in *Rights Against Rules* and elsewhere about the tension between rule-dependence and the existence of "personal rights," and relies upon a conception of "personal rights" that I believe to be incoherent. Finally, Part IV commences the task of comparing rule-dependent adjudicatory models in light of constitutional norms, by delineating in a very tentative and preliminary way how that comparison should be performed.

### I. THE RULE-DEPENDENCE OF CONSTITUTIONAL DOCTRINE

My article, *Rights Against Rules*, advanced the following descriptive claim: Constitutional doctrine as it now stands is *rule-dependent*.<sup>8</sup> Doctrine makes the existence of a particular kind of legal rule — a rule with a particular scope, language, or history — a necessary condition for a viable constitutional challenge. My central example was drawn from the Supreme Court's decision in the flag burning case, *Texas v. Johnson*.<sup>9</sup> The Court overturned the defendant's sanction because it had been imposed pursuant to a law that prohibited "desecrat[ing] . . . a state or national flag,"<sup>10</sup> and was therefore targeted at speech rather than conduct.<sup>11</sup> Relatedly, the Court made clear that Johnson would have no constitutional objection if he had been prosecuted (or were prosecuted in the future) pursuant to a neutral law covering his act of flag burning, such as a rule prohibiting arson, battery, or the destruction of government property.<sup>12</sup> Johnson was successful in securing relief from a constitutional reviewing court only because a particular type of legal rule was in force, namely a rule whose language was speech-targeted. And I showed, in the first part of *Rights Against Rules*, that *Texas v. Johnson* is representative of much of constitutional doctrine under the Bill of Rights rather than being unusual or sui

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<sup>8</sup> In *Rights Against Rules*, I used the term "Basic Structure" to refer to this feature of constitutional doctrine. See Adler, *Rights Against Rules*, *supra* note 2, at 13–39.

<sup>9</sup> 491 U.S. 397 (1989); see Adler, *Rights Against Rules*, *supra* note 2, at 3–8 (discussing *Texas v. Johnson*); *id.* at 41 (presenting a stylized case, analyzed throughout the article, that is based on *Texas v. Johnson*).

<sup>10</sup> *Johnson*, 491 U.S. at 400 n.1.

<sup>11</sup> See *id.* at 406 ("A law directed at the communicative nature of conduct must . . . be justified by the substantial showing of need that the First Amendment requires." (emphasis omitted) (citation omitted) (internal quotation marks omitted)).

<sup>12</sup> *Id.* at 413 n.8 ("We . . . emphasize that Johnson was prosecuted *only* for flag-desecration — not for trespass, disorderly conduct, or arson."); see also Adler, *Rights Against Rules*, *supra* note 2, at 3–5 (providing further support for the claim that the Court's holding did not immunize Johnson from future sanction pursuant to an appropriately neutral rule).

generis.<sup>13</sup> Free speech doctrine,<sup>14</sup> free exercise doctrine,<sup>15</sup> substantive due process doctrine,<sup>16</sup> and equal protection doctrine<sup>17</sup> are all structured around familiar "tests" that measure whether rules are "discriminatory" (for example, discriminatory against particular speech contents, religious groups, or racial groups), or appropriately tailored (for example, "narrowly tailored" to a "compelling government interest"), or motivated by an improper purpose, or overbroad.

The rule-dependence claim is, crucially, a *descriptive* claim about constitutional doctrines as they now exist and have existed for some time. *Rights Against Rules* was, I think, reasonably clear on this point.<sup>18</sup> I did not claim that a corpus of constitutional doctrines that made no reference to rules was impossible or, even, normatively unattractive relative to a rule-dependent structure. For example, a world in which reviewing courts adjudicate constitutional challenges to sanctions by focusing exclusively on the features of the particular action performed by the claimant (or on such act-properties plus other particular features of the claimant, such as her history, wealth, or the size of the sanction she has received), and not at all on the language, scope, or history of the rule that has given rise to the challenged sanction, is a possible constitutional world and, maybe, a better one than our actual constitutional world.<sup>19</sup> But our actual doctrines do make the existence of various types of rules a necessary, albeit not always sufficient, condition for a wide range of constitutional challenges. *Rights Against Rules* took this to be a feature of our actual doctrines sufficiently deep that any realistic model of constitutional adjudication ought to accept it.

Professor Fallon agrees that many constitutional doctrines are in fact rule-dependent. He states: "[I accept] Adler's important insight that *many* (but not all) constitutional rights are rights against rules . . . ." <sup>20</sup> He also agrees that widespread rule-dependence is a feature of constitutional doctrine sufficiently deep that any realistic model of constitutional adjudication ought to accept it.<sup>21</sup> Fallon does suggest that the rule-dependence claim needs to be qualified: "[N]ot all rights

<sup>13</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 13-31.

<sup>14</sup> See *id.* at 19-26 (discussing free speech doctrine).

<sup>15</sup> See *id.* at 29-30 (discussing free exercise doctrine).

<sup>16</sup> See *id.* at 30-33 (discussing substantive due process doctrine).

<sup>17</sup> See *id.* at 26-29 (discussing equal protection doctrine).

<sup>18</sup> See *id.* at 15.

<sup>19</sup> See *id.* at 13-15 (describing the possibility of a constitutional structure in which actions are "shielded," and abstaining from any normative comparison of that structure with the existing, rule-dependent structure).

<sup>20</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1325.

<sup>21</sup> Indeed, because Fallon thinks that there exists a personal constitutional right not to be sanctioned pursuant to an invalid rule, while I deny the existence of such a right, see *infra* pp. 1395-98, his commitment to rule-dependent doctrine is deeper than mine.



fit [the rule-dependence] framework . . . ."<sup>22</sup> This suggestion is absolutely correct. Some kinds of constitutional challenges, even under the Bill of Rights, do not entail the existence of a particular type of rule. Here is one example: If a government official tortures someone, that person can obtain a damages remedy against the official for a violation of substantive due process regardless of the language or history of the rule that the official was following — indeed, regardless whether the official's action was authorized, or taken to be authorized, by any legal rule.<sup>23</sup> Fallon provides other examples of rule-independent doctrines.<sup>24</sup> The rule-dependence claim should be reformulated as the claim that constitutional doctrines (at least under the Bill of Rights) are widely or frequently rule-dependent, and not the claim that they are exclusively rule-dependent. *Rights Against Rules*, read as a whole, does not present the rule-dependence claim as a universal one — indeed, I stated explicitly that my focus in the article was on the subset of doctrines that furnish substantive challenges to conduct-regulating rules<sup>25</sup> — but some of my language was sloppy and did suggest, incorrectly, that rule-dependence was universally true.

So Professor Fallon and I agree that rule-dependence is a general, if not invariable, feature of the Supreme Court's constitutional case law under the Bill of Rights (that is, its case law specifying the conditions under which courts should provide relief to claimants raising constitutional challenges under the Bill of Rights).<sup>26</sup> More precisely, we agree

<sup>22</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1365.

<sup>23</sup> See Matthew D. Adler, *Personal Rights and Rule-Dependence: Can the Two Co-Exist?*, 6 LEGAL THEORY (forthcoming Dec. 2000) (manuscript at 7, on file with the Harvard Law School Library) [hereinafter Adler, *Personal Rights and Rule-Dependence*] (discussing the "torture" example and citing *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1718 (1998)). Fallon properly notes that a damages remedy for an unconstitutional government act may be precluded by the absence of a cause of action or by official immunity. See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1362 n.212. My claim here is simply that the merits of a constitutional damages suit for torture (assuming a cause of action, no official immunity, and no other such threshold obstacle to that suit) do not depend on the existence of a particular type of rule that the official who performed the act of torture was following; and that as a matter of constitutional law, the existence of a particular rule is not a prerequisite for overcoming any threshold obstacle to a constitutional damages suit for torture (for example, official immunity).

<sup>24</sup> See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1365–67.

<sup>25</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 16 & n.55.

<sup>26</sup> *Rights Against Rules* did not discuss whether constitutional doctrine outside the Bill of Rights is widely rule-dependent, nor have I done so elsewhere. I therefore confine my claim here to the Bill of Rights, by which I mean to include the Civil War Amendments (specifically, Section 1 of the Thirteenth, Fourteenth, and Fifteenth Amendments).

Clearly, some constitutional doctrine outside the Bill of Rights is rule-dependent. Indeed, some of Fallon's central examples concern constitutional provisions lying outside the Bill of Rights as here defined. See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, section I.A.1, at 1329–34 (discussing *United States v. Raines*, involving the scope of Congress's enforcement power under Section 2 of the Fifteenth Amendment); *id.* section II.D, at 1356–59 (discussing *Florida Prepaid*, involving the scope of Congress's enforcement power under Section 5 of the Four-



that constitutional doctrine generally, if not invariably, entails the existence of legal *rules or subrules*. (As I shall explain in Part II, the Fallon Model is focused on subrules, while the Adler Model is focused on rules, so the phrase “rules or subrules” is needed to formulate the rule-dependence claim in a version that Fallon and I can agree on.) Professor Fallon and I also agree, at least in a general way, on the function of rule-dependent doctrines. Narrow tailoring tests, discrimination tests, improper purpose tests, and the like, all concern the *validity* of rules (or, in Fallon’s case, subrules).<sup>27</sup> The Bill of Rights embodies a variety of constitutional norms, or what Fallon sometimes calls “constitutional values”<sup>28</sup> — norms of free speech, of equality, of due process. These norms might be moral norms, or they might not be; that is a matter of continuing scholarly dispute<sup>29</sup> on which I will be, at least for the purposes of this Response, agnostic. In any event, a given rule (or, for Fallon, a given subrule) can be evaluated as “valid” or “invalid” in light of a given constitutional norm. Roughly, a given rule is invalid in light of a given norm if it infringes the norm — if the existence of the rule is worse in light of the norm than the existence of some other rule, or no rule at all — and is not justified by considerations sufficiently strong to override the norm. A similar account can be given of the validity of subrules.

Rule-dependent constitutional doctrine is, in turn, designed to measure the validity of rules or subrules in light of underlying constitutional norms. As Fallon puts it:

[C]onstitutional tests and doctrines should always reflect, but need not directly embody, underlying constitutional norms. A gap frequently exists between constitutional meaning and the doctrines crafted by the courts. In devising tests, courts must make practical, occasionally tactical judg-

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teenth Amendment). Insofar as a given constitutional doctrine (whatever its provenance) is rule-dependent, my arguments for the inconsistency of rule-dependence and personal rights do, I believe, apply. These arguments, as formulated in my articles *Rights Against Rules*, *supra* note 2, and *Personal Rights and Rule-Dependence*, *supra* note 23, do not presuppose that the rule-dependent doctrine is grounded in the Bill of Rights. See *infra* p. 1395 (describing the articles). In short, there is no personal right not to be sanctioned pursuant to an invalid rule, regardless whether the rule is invalid under the First Amendment, Section 1 of the Fourteenth Amendment, Section 5 of the Fourteenth Amendment, the Commerce Clause, or some other provision of the Constitution. See *infra* pp. 1395–1402 (claiming that the “Valid Rule Principle” is untrue and discussing Fallon’s response to that claim).

<sup>27</sup> See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331 (asserting the existence of a “personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law”); *id.* at 1337–38 (describing a variety of rule-validity tests).

<sup>28</sup> *Id.* at 1352.

<sup>29</sup> See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 781 n.69 (1997) [hereinafter Adler, *Judicial Restraint*] (citing literature).



ments about what is necessary or appropriate to ensure that constitutional values are effectively realized without excessive costs.<sup>30</sup>

This is a statement with which I wholeheartedly agree. Constitutional tests concerning the language, scope, and history of a rule or subrule need not directly incorporate underlying constitutional norms, given the institutional limitations of reviewing courts, such as their epistemic deficits or the sheer decisional costs of constitutional review.<sup>31</sup> A given rule or subrule might be: (i) valid in light of doctrinal tests, but invalid in light of certain ("underenforced") constitutional norms<sup>32</sup>; or (ii) invalid in light of doctrinal tests, but valid in light of constitutional norms.<sup>33</sup> The rationale for (i) might be that courts would strike down too many rules or subrules that are valid in light of constitutional norms, if courts were permitted to invoke the underenforced norms. The rationale for (ii) might be that overinclusive tests capture some rules or subrules that are invalid in light of the norms and that epistemically imperfect reviewing courts would otherwise uphold. Nonetheless, there remains a close connection between our doctrinal tests and constitutional norms. Rule-validity tests, again, are designed to measure validity in light of the norms — or, a bit more precisely, a mismatch between test and norm is justified only when judicial shortcomings can be adduced, such that it can be expected that courts will not perfectly enforce the norm.

## II. TWO RULE-DEPENDENT MODELS OF CONSTITUTIONAL ADJUDICATION: THE ADLER MODEL AND THE FALLON MODEL

Professor Fallon and I propose two different models of constitutional adjudication, both of which are consistent with the rule-dependent cast of much constitutional doctrine and, more specifically, with the proposition that rule-dependent doctrine is designed to measure the validity of legal rules or subrules in light of underlying constitutional norms (whether moral norms, nonmoral norms, or a combination). Because rule-dependence is not universally true of constitutional doctrine, these are not exclusive or exhaustive models. Rather, they purport to represent the structure of constitutional review insofar as doctrines make reference to the scope, language, history, or other properties of legal rules or subrules.

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<sup>30</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1351–52 (footnotes omitted).

<sup>31</sup> See Adler, *Judicial Restraint*, *supra* note 29, at 711–85 (analyzing "institutional" arguments against judicial review).

<sup>32</sup> See generally Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (asserting that some constitutional norms are underenforced, and describing grounds for underenforcement).

<sup>33</sup> See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing that prophylactic rules are a central feature of constitutional doctrine).

The Adler Model is described at length in *Rights Against Rules*,<sup>34</sup> but its essential features can be stated quite compactly:

THE ADLER MODEL

- *The Judicial Function*: The function of a reviewing court is to invalidate (that is, to repeal or amend) rules that are invalid.
- *The Identity of Constitutional Claimants*: Anyone with Article III standing — anyone who would stand to benefit from the repeal or amendment of a challenged rule — is a full-fledged constitutional claimant.
- *The "Merits" Stage of Constitutional Adjudication*: The court determines whether the challenged rule is invalid or valid in light of doctrinal tests. A "rule," here, means some textually distinct segment (such as a sentence, a paragraph, a proviso, or a code section) of the aggregate, canonical text comprising all enacted legal rules.<sup>35</sup> The text comprising the rule is measured against applicable doctrinal tests. If the rule satisfies the tests, then the claimant's challenge is rejected; if the rule fails the tests, then the claimant's challenge succeeds and the court proceeds to the remedial stage of constitutional adjudication.
- *The Remedial Stage of Constitutional Adjudication*: The Court either repeals (facially invalidates) or amends (partially invalidates) an invalid rule, depending on remedial doctrine. The temporal scope of the repeal or amendment — whether it is prospective, retroactive, both prospective and retroactive, or has some esoteric temporal scope — also depends upon remedial doctrine. Remedial doctrine, in turn, should be designed to produce the best set of rules in light of underlying constitutional norms.<sup>36</sup>
- *The Force of Judicial Remedies*: The force of the court's judgment extends well beyond the particular parties to the case. A Supreme Court order invalidating a rule obliges state officials not to enforce the rule (or the invalidated portion of the rule, in the case of a partial invalidation) against any person. A lower court order invalidating a rule obliges state officials not to enforce the rule (or the invalidated

<sup>34</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 91–152 (presenting the "Derivative Account," that is, the Adler Model of rule-dependent adjudication).

<sup>35</sup> More precisely, the constitutional court evaluates this textually-defined rule, as glossed by its authoritative interpreter. See *infra* pp. 1407–08 (clarifying this point about the Adler Model).

<sup>36</sup> Conceivably, there could be Article III constraints on the shape of remedial doctrine. If so, the Adler Model recognizes that courts would have to comply with these constraints. For example, it would conceivably violate Article III for a court to partially invalidate a rule but sustain the claimant's own sanction. See Adler, *Rights Against Rules*, *supra* note 2, at 121–22 (discussing this issue). However, such Article III constraints are *extrinsic* to the Adler Model; the appropriate doctrine, within that Model, is the doctrine designed to produce the best set of rules, in light of underlying constitutional norms. See *id.* at 121–22, 167 (noting that Article III considerations are *extrinsic* to the Adler Model). In my summary of the Adler Model, I state that any claimant with Article III standing is a full-fledged claimant; strictly, this follows both from the Model and from the constraints of Article III.



portion of the rule, in the case of a partial invalidation) against any person, at least where a sufficient number of lower courts concur in the proposition that the rule is invalid.<sup>37</sup> In short, judicial orders invalidating rules are roughly equivalent, in their legal effect, to legislative repeals or amendments of rules.

What about the Fallon Model? Fallon's central idea is that "everyone has a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law."<sup>38</sup> This suggests that the paradigmatic constitutional claimant is not (as for me) anyone who would benefit from the repeal or amendment of a rule and thereby would have Article III standing to secure its invalidation, but (more narrowly) anyone to whom a rule *applies*, and who suffers or fears a setback to her interests as a result of the rule. Indeed, Fallon says this fairly explicitly:

When an enforcement action that would violate the Constitution is threatened, I assume that the valid rule requirement . . . supports a cause of action for the target (if standing and other justiciability requirements are met) to enjoin looming, unlawful government action. . . .

<sup>37</sup> I argue in *Rights Against Rules* that a single lower court order should not function to repeal or amend a rule, when there are multiple courts with jurisdiction over that rule. However, when all or most such courts agree as to the rule's invalidity, their orders taken together should indeed function to repeal or amend it. In short, enforcement officials can "nonacquiesce" in invalidation orders only when the intercourt dialogue about the appropriate change to the operative language of the challenged rule is, in relevant part, incomplete. See *id.* at 149-50.

Fallon suggests that the Adler Model — in preventing a single lower court judgment from invalidating a rule and requiring some degree of intercourt dialogue instead — has thereby "retreat[ed]" almost completely to the view that lower court judgments protect only parties and leave enforcement officials free to enforce invalid rules against nonparties. See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1340 n.108. This is incorrect. The Adler Model will incorporate doctrines of precedent and permissible nonacquiescence that allow *some* degree of lower court dialogue. For example, in the simple case of a federal statute, the "dialogue"-permitting doctrines might plausibly be structured as follows: (1) if a federal district court holds the statute invalid, then (as a matter of precedent) other courts within that district are bound by that ruling, but courts within other districts are not; (2) if a federal circuit court holds the statute invalid, then (as a matter of precedent) other courts within that circuit are bound by that ruling, but courts within other circuits are not; and (3) enforcement officials are not obliged to refrain from enforcing the statute, beyond the scope of *res judicata*, until it has been invalidated by the Supreme Court, or in most or all of the circuits. This is hardly the same as the above-stated view because — once the statute *has* been held invalid in most or all of the circuits — prosecutorial officials *will* be bound to refrain from enforcing it, even against persons not protected by *res judicata*. To put the point most starkly: If the twelve circuits, in twelve nonclass cases, unanimously hold a given statute invalid, then (as a matter of *res judicata*) prosecutorial officials are simply obliged to refrain from enforcing the statute against those twelve, while (under the Adler Model) the statute is as good as repealed until a narrowing construction or judicial or legislative amendment is put in place. See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (distinguishing between the technical scope of *res judicata* and justified nonacquiescence, and identifying conditions under which nonacquiescence by federal agency officials in judicial rulings is justified and conditions under which nonacquiescence is unjustified).

<sup>38</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331.



... [A different case would] ... be presented by a party who claimed to be harmed by the actual or threatened enforcement of an invalid rule against someone else — for example, a mother who claimed to be harmed by the infliction of an allegedly unconstitutional capital punishment on her son. ... I mean to claim only that a litigant has a personal constitutional right to relief from *the actual or threatened enforcement of an invalid rule directly against her*, in a case in which she can establish the requisites of first-party standing by showing personal injury, causation of the harm by the defendant, and redressability of the harm through the relief sought.<sup>39</sup>

As for Fallon's account of the "merits" stage of constitutional adjudication, that subject is discussed at considerable length in his Commentary. The core idea here is the idea of a "subrule."<sup>40</sup> Fallon would not, I think, disagree with my textualist definition of a legal "rule": as some textually distinct segment (for example, a sentence, a paragraph, a proviso, a code section) of the aggregate, canonical text comprising all enacted legal rules. Our disagreement (insofar as we are discussing the "merits" stage of constitutional adjudication) concerns not the definition of "rule," but rather the focus of judicial scrutiny. I think that courts are concerned with the validity of textually-defined rules; Fallon thinks that courts are concerned (at least in general) with the validity of the *subrules* of textually-defined rules. According to Fallon, when some claimant challenges his treatment pursuant to a legal rule, the reviewing court asks whether there is some subrule of the challenged rule that (1) applies to the claimant, (2) is valid in light of rule-validity tests, and (3) is appropriately severable. Again, let me quote directly from Fallon's Commentary, here discussing the Supreme Court's decision in *United States v. Raines*,<sup>41</sup> which rejected a challenge by a state official to a federal statute that prohibited "any person" from race-based interference with voting rights:

[Underlying the Court's approach was] an implicit assumption that any constitutionally invalid statutory *subrules*, as I shall call them, could be severed or separated from valid ones. From the Court's perspective, it was as if the statute said that relief should be available against "any person" who interferes with voting rights, "such as any person who (i) is a public official;" or "(ii) is not a public official and not acting with the cooperation or acquiescence of a public official." Within the Court's con-

<sup>39</sup> *Id.* at 1362 n.212 (emphasis added) (citations omitted).

<sup>40</sup> Although the idea of "subrules" pervades Fallon's Commentary, it is explicated first and most fully in Part I. See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1327-41. The concept of subrules also figures centrally in Dorf's model of constitutional adjudication. Although Dorf does not actually use the term "subrule," a central premise of his model — as of Fallon's — is that a constitutional rule-validity challenge should fail if there exists a valid and severable portion of the challenged rule that applies to the claimant. See Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 5; Dorf, *The Heterogeneity of Rights*, *supra* note 5 (manuscript at 14-28).

<sup>41</sup> 362 U.S. 17 (1960).



templation, even if subrule (ii) would appropriately be specified as encompassed by the statute (a question that it postponed), and even if subrule (ii) would be unconstitutional (a question that it also deferred), subrule (ii) could be severed and subrule (i) upheld and enforced.<sup>42</sup>

What, precisely, is a "subrule" of a given rule? Fallon does not offer a detailed definition, but the above-quoted paragraph, along with statements that Fallon makes elsewhere in the Commentary, suggest that he has in mind the following account or at least something roughly like it. For any given rule, let us define a "permissible reformulation" (my term, not Fallon's) of that rule as follows: A permissible reformulation is some linguistic formulation that is sufficiently close in its language and scope to the given rule that the reformulation can in some sense be attributed to the legislature, rather than merely being a judicial invention.<sup>43</sup> In turn, a "subrule" of a given rule is some textually-defined portion of some permissible reformulation of that rule.<sup>44</sup>

<sup>42</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331 (footnote omitted).

<sup>43</sup> See *id.* at 1333-34 ("[A]ny separation of a statute through its specification into subrules must not cross the vague line that divides judicial interpretation from judicial legislation. Judicial lawmaking would occur, for example, if the particular subrules that a court would need to specify to 'save' part of a statute would not sufficiently reflect the structure and history of the statute to be attributed to Congress, rather than the court.").

<sup>44</sup> There is some ambiguity in Fallon's Commentary, as I read it, about the definition of a subrule. On one reading — the reading I have just put forward in the text, and will mainly rely upon in this Response — *S* is a subrule of rule *R* if *S* is some textually-defined portion of some permissible reformulation of *R*. That is to say: *S* is a subrule of *R* even if *S* is too different from *R* to count as an acceptable interpretation (permissible reformulation) of *R*, as long as *S* is some severable portion of some acceptable interpretation (permissible reformulation) of *R*. However, on a different reading of Fallon's Commentary, *S* cannot be a subrule of *R* unless *S* itself is an acceptable interpretation of *R* — an interpretation acceptable in light of applicable interpretive norms, including the norm that statutes and other rules should be construed to avoid constitutional difficulties. See *id.* at 1334 n.67 ("Another way to formulate the problem is to ask at what point the statute that would effectively emerge from the judicial specification of subrules and severance of invalid from valid ones should be deemed a new rule that a court should not create either for policy or separation of powers reasons."). Note, crucially, that the norm of construing statutes and other rules to avoid constitutional difficulties can only be pushed so far; for a given *R*, there could well be some severable portions of *R* or of its permissible reformulations that do not themselves count as acceptable interpretations, even in light of the constitutional-difficulty-avoidance norm. See, e.g., *Chapman v. United States*, 500 U.S. 453, 464 (1991) ("The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is 'not a license for the judiciary to rewrite language enacted by the legislatures.'" (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989))).

I have adopted the first reading of Fallon — that *S* need not itself be an acceptable interpretation of *R*, as long as it is some severable portion of some acceptable interpretation thereof — because the second reading makes terms like "severable" and "subrule," which appear pervasively in Fallon's Commentary, quite unnecessary. The second reading could be articulated as follows: "In adjudicating a claim that some rule *R* is constitutionally invalid, the court should not sustain the claim unless there is no narrowing construction or other interpretation of *R* that is valid."

However, I should also note that my analysis of the Fallon Model does not generally depend upon his precise definition of "subrule." The claims I advance below in sections III.A, B, C, and



What does it mean to say that a particular subrule is "severable" and thus (within the Fallon Model) should trigger the rejection of the claimant's challenge if the subrule is valid and covers the claimant? Again, Fallon does not offer a fully precise definition. I take him to mean severability from the rest of the rule — a kind of clause-severability.<sup>45</sup> Thus, let us say that a subrule is "severable" within the Fallon Model if severability norms prescribe that the subrule would remain in force were all the remaining provisions of the rule (strictly, all the remaining provisions of the permissible reformulation from which the subrule arises) to be invalidated. The relevant severability norms, at least in Fallon's view, are generally state norms in the case of state statutes, and federal common law or legislative norms in the case of federal statutes.<sup>46</sup>

Fallon allows that constitutional doctrine sometimes requires reviewing courts to focus on the validity of rules rather than subrules:

[S]ome tests (such as the First Amendment overbreadth test) identify defects that could in principle be avoided by some of a statute's subrules, but may nonetheless be applied to invalidate statutes on their faces, because an applicable legal principle establishes that . . . the challenged statute must be relatively fully specified at the time of the test's application . . . [and that] otherwise valid subrules cannot subsequently be separated from invalid ones.<sup>47</sup>

In other words, constitutional doctrine sometimes adds the following sort of special proviso to the process of subrule specification and test-

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E, pp. 1386-1406, 1411-12, and in Part IV, pp. 1412-20, of this Response hold good — I believe — regardless whether the first or the second reading of "subrule" is adopted. The only portion of my analysis that *does* depend upon the first reading of "subrule" is that offered below in section III.D, 1406-11, where I claim that Fallon's focus on severable portions of permissible reformulations of rules puts him in tension with ordinary views about statutory interpretation.

<sup>45</sup> See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331 n.55 ("The severability question asks whether a court's holding that part of a statute is invalid causes the remainder of the statute to be invalidated as well." (quoting John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 207 (1993)) (internal quotation marks omitted)). In the case of subrule specification, where *S* is a textual portion of some permissible reformulation of rule *R*, the part of *R*'s reformulation that has been invalidated is the *remaining* textual portion, which has not been incorporated within *S*. Thus I take Fallonian severability to be a kind of clause-severability. For example, in Fallon's discussion of the *Raines* case, a rule barring "any person" from interfering with voting rights is reformulated as a rule barring "any person who (i) is a public official; or (ii) is not a public official and not acting with the cooperation or acquiescence of a public official," and the question of severability is whether a subrule limited to clause (i) would survive in the event that clause (ii) were to be struck down. *Id.* at 1331; see also *id.* section I.A.1, at 1329-34 (discussing *Raines*).

<sup>46</sup> See *id.* at 1334 n.67. This is only an approximate statement of Fallon's view, because he also notes and perhaps accepts that "entrenched Supreme Court precedent introduces a presumption, arguably binding on federal courts, that state statutes are severable unless a state court has held the contrary, even though the state law of severability might be otherwise." *Id.* at 1350 (footnote omitted).

<sup>47</sup> *Id.* at 1346.



ing envisioned by the Fallon Model: (1) The only "permissible reformulation" of the rule is the rule itself; and (2) no subrules of that rule are severable. Fallon concedes that this proviso has the same effect as instructing courts to ignore subrules entirely, and to sustain constitutional challenges if and only if the underlying rule is invalid under applicable doctrinal tests.<sup>48</sup> But Fallon also argues that "overbreadth" and other such doctrines that shift judicial scrutiny from subrules to rules should be unusual: "[A]s-applied adjudication on the *Raines* model should remain the norm."<sup>49</sup> Because my summary and evaluation of the Fallon Model will be simpler and clearer without the "overbreadth" possibility, and because that feature of the model should not (in Fallon's view) be frequently employed, I will henceforth generally ignore it.

So much for the identity of constitutional claimants and the "merits" stage of constitutional adjudication. On the issue of remedy, Fallon's view is that the force of a judicial decision sustaining a constitutional challenge to a rule need not extend beyond the claimant. It may thus extend — for example, if the judgment is issued by the Supreme Court<sup>50</sup> — but no such breadth is entailed by his model of adjudication. (By contrast, the Adler Model envisions courts as repealing or amending rules, and thus does entail that judicial orders bind nonparties.) In particular, Fallon thinks that a lower federal court decision sustaining a constitutional challenge to a state law rule necessarily protects only those persons — typically the claimant or his privities — for whom the decision is *res judicata*. State enforcement officials are *not* obliged by the decision to refrain from enforcing the rule against other persons; similarly, the decision need not have any binding effect on

<sup>48</sup> See generally *id.* at 1346–48 (discussing "overbreadth" and other doctrines that demand relatively full specification of statutes and limit severability).

<sup>49</sup> *Id.* at 1352.

<sup>50</sup> See *id.* at 1339–40 ("[I]f the Supreme Court concludes that a federal statute is invalid because enacted for a forbidden purpose, the Court's decision has claim- and issue-preclusive effects only with respect to the named parties. Under the doctrine of precedent, however, the Court's conclusion that the statute is invalid would bind all lower courts in all future cases." (footnote omitted)); *id.* at 1341 n.109 ("In my view, a Supreme Court judgment of facial invalidity should preclude the imposition of sanctions under a state statute for any act committed before the narrowing construction [of the statute] was obtained."). Notably, Fallon never says explicitly that Supreme Court decisions bind enforcement officials as well as state courts. I think they do, as a result of the Court's decision in *Cooper v. Aaron*, 358 U.S. 1 (1958). See Adler, *Rights Against Rules*, *supra* note 2, at 147–48 (relying on *Cooper* to argue that "[a] holding by the Supreme Court that a state or federal statute is facially or partly invalid operates to rescind the legal authority of enforcement officials and lower courts to apply the statute (within the invalidated portion) to anyone, at least pending an authoritative narrowing construction of the statute").

Fallon's failure to endorse or even cite *Cooper* exemplifies the feature of the Fallon Model that I am discussing here — the fact that the Model does not entail a remedial effect for judicial orders, even Supreme Court orders, beyond the protection of the particular claimant who has successfully challenged his own treatment pursuant to an invalid rule.



state courts, beyond the scope of res judicata: "Determinations by lower federal courts that state statutes are facially invalid are not binding on state courts except insofar as doctrines of claim and issue preclusion apply."<sup>51</sup>

What Fallon says about remedies, here, is consistent with the basic idea that constitutional adjudication vindicates the personal rights of claimants. The claimant who falls within the scope of a rule challenges its application to her; the court determines whether there is some valid and severable subrule covering the claimant; if not, the court issues a remedy that necessarily repairs or forestalls the setback to the claimant constituted by the application of the rule to her, but only contingently repairs or forestalls harms to anyone else.

In summary, the Fallon Model of constitutional adjudication (insofar as doctrine is rule-dependent) has the following elements, each of which differs quite dramatically from the corresponding elements of the Adler Model:

#### THE FALLON MODEL

- *The Judicial Function*: The function of a reviewing court is to secure the personal constitutional right not to be sanctioned or otherwise harmed by the application of an invalid rule.
- *The Identity of Constitutional Claimants*: Anyone to whom a colorably invalid rule has been applied (or will be applied), to that person's detriment, is a full-fledged constitutional claimant. A "rule" is defined, as per the Adler Model, as some textually distinct segment (such as a

<sup>51</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1341 n.109 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). Fallon quotes language from *Doran* elsewhere in his Commentary. See *id.* at 1340 n.108 ("[N]either declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." (quoting *Doran*, 422 U.S. at 931) (internal quotation marks omitted)). Fallon's just-quoted statement, together with his citation to and quotation from *Doran*, seems to say that a lower federal court decision *does not* have a binding effect on state courts beyond the scope of claim and issue preclusion. At another point, however, Fallon states that "[i]n cases involving rulings by federal courts on the validity of state statutes, matters grow more complex [than where federal statutes are at issue]," but at bottom, "[t]he binding effect of a federal judgment depends on doctrines of claim and issue preclusion and of precedent." *Id.* at 1340 (emphasis added) (footnote omitted). This language suggests that a lower federal court judgment could bind state courts — although it need not — and that whether it does depends upon the applicable (perhaps state, perhaps federal) doctrines of stare decisis. There is also a hint in Fallon's Commentary that a lower federal court judgment could, in a special case, bind state enforcement officials with respect to nonparties. See *id.* at 1340 n.105 (citing sources discussing the possibility of nonmutual offensive collateral estoppel against state governments and the federal government).

By contrast, under the Adler Model, a lower federal court order invalidating a state statute or other rule, if concurred in by the appropriate state courts, should have a stare decisis effect at least with respect to state and federal courts not superior to the courts that initially issued the invalidation orders. It should also — as I have already stated — have a binding effect with respect to all enforcement officials, not just those whose enforcement actions are covered by res judicata. See *supra* pp. 1378–79.



sentence, a paragraph, a proviso, or a code section) of the aggregate, canonical text comprising all enacted legal rules.

- *The "Merits" Stage of Constitutional Adjudication:* The court determines whether the challenged rule contains some valid severable subrule covering the claimant. If so, the claimant's challenge fails. If not, the challenge succeeds and the court proceeds to the remedial stage.
- *The Remedial Stage of Constitutional Adjudication:* The court overturns the claimant's own treatment (for example, her sanction, her duty, or the denial of her benefit) pursuant to the rule.
- *The Force of Judicial Remedies:* The force of the court's judgment may in special cases extend to nonparties, and oblige enforcement officials not to enforce the rule (in the portion lacking valid severable subrules) against any person, but constitutional judgments need not have this protective effect with respect to nonparties and in general do not.<sup>52</sup>

TABLE 1

	<i>Adler Model</i>	<i>Fallon Model</i>
Judicial Function	Overturning invalid rules	Vindicating personal rights
Claimant	Anyone with Article III standing	Anyone to whom a challenged rule applies
"Merits" Stage	Does the rule satisfy rule-validity tests?	Does the rule have a valid severable subrule covering the claimant?
Remedial Stage	An amendment (partial invalidation) or repeal (facial invalidation) of the invalid rule	An invalidation of the claimant's own treatment pursuant to the rule
Force of the Judicial Remedy	Prevents the rule from being applied (in its invalidated portion) to anyone	Typically protects only the claimant

<sup>52</sup> In his discussion of preclusion and precedent, Fallon does not identify a single scenario in which he thinks federal court judgments bind enforcement officials beyond the scope of *res judicata*. See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, section I.B.2, at 1339-40 (discussing preclusion and precedent); *supra* note 50 (discussing Fallon's failure to endorse *Cooper v. Aaron*). Nonetheless, I do not interpret him to say that federal court judgments *can never* have a protective effect with respect to nonparties, against enforcement officials, and such an impossibility claim would not follow from the Fallon Model.

### III. NO HELP HERE: SOME FACTORS THAT DO NOT FAVOR FALLON

The Fallon Model and the Adler Model are two internally consistent models of constitutional adjudication that give strikingly different accounts of the rule-dependent cast of constitutional doctrine. The Adler Model sees courts as repealing and amending invalid rules, and claimants as "private attorneys general" who trigger this quasi-legislative process of rule invalidation, and who must meet the basic requirements of Article III standing but do not vindicate their personal constitutional rights. The Fallon Model sees courts as vindicating the personal constitutional rights of claimants not to be sanctioned or otherwise harmed pursuant to an invalid rule (more precisely, a rule without a valid severable subrule covering the claimant).

How should we decide between the two models? In this Part, I consider a variety of factors that might be thought to count in favor of the Fallon Model, and conclude that none do so. These factors are: (1) existing Supreme Court doctrine concerning "facial" and "as-applied" challenges; (2) the "Personal Rights Thesis," by which I mean the thesis that successful constitutional claimants normally possess a personal right that is violated by the unconstitutional state action that they challenge; (3) the "Valid Rule Principle," by which I mean the principle that there exists a personal constitutional right not to be sanctioned or otherwise harmed pursuant to an invalid rule; (4) ordinary and accepted notions of how courts should construe statutes; and (5) the limited scope of judicial remedies.

Fallon himself does not argue that all of these factors favor his model. Rather, he mainly relies upon (3) and (4); does not heavily rely upon (2) and (5); and clearly does not rely upon (1). But I will (at least briefly) consider all five factors here — because in order to establish my thesis that constitutional norms should determine the choice between the Adler Model and the Fallon Model, I need to rule out other considerations that arguably bear upon that choice.<sup>53</sup>

#### A. *The Doctrine of Facial and As-Applied Challenges: Salerno*

The basic Supreme Court doctrines concerning "facial" and "as-applied" challenges are set forth in the *Salerno* case,<sup>54</sup> and run essen-

<sup>53</sup> I will actually end up arguing that the ordinary account of statutory interpretation supports the Adler Model, not the Fallon Model. See *infra* section III.D, pp. 1406–11. However, I do not think this consideration should be given very much weight in adjudicating between the models — if the Fallon Model turned out to be better in light of constitutional norms, I would counsel a revision of our ordinary views about statutory interpretation, so as to accommodate his model. Thus, I will not claim that my own model should be accepted by virtue of this factor.

<sup>54</sup> *United States v. Salerno*, 481 U.S. 739 (1987). The scholarly literature concerning *Salerno* and the propriety of "facial" and "as-applied" challenges began with Michael Dorf's work, see



tially as follows. There are two types of constitutional challenges, "as-applied" challenges and "facial" challenges. As-applied challenges are the standard kind of constitutional challenge, while facial challenges are unusual. A facial challenge to a rule should succeed only if (1) there exists no set of circumstances under which the rule could be constitutionally applied, or (2) the facial invalidation of the rule is warranted by the "overbreadth" doctrine, a special doctrine limited to the First Amendment.<sup>55</sup> I will refer to this basic (and official) account of facial and as-applied challenges as the "*Salerno* Doctrines."

The Adler Model is clearly inconsistent with the *Salerno* Doctrines. According to the Adler Model, all constitutional challenges are *facial* challenges. The "merits" stage of each and every constitutional case (at least where doctrine is rule-dependent) consists of an evaluation of the challenged rule in light of rule-validity tests; the details of the challenger's own situation are irrelevant. At best, there is a distinction between "facial" and "as-applied" challenges that comes in at the remedial stage, but this is more aptly phrased as a distinction between facial invalidation (where the court completely repeals an invalid rule) and partial invalidation (where the court amends, rather than repeals, an invalid rule).<sup>56</sup> Finally, the Adler Model gives no primacy to the remedy of partial invalidation over the remedy of facial invalidation; which remedy is appropriate is an open question, the answer to which

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sources cited *supra* note 5, and now also includes my article, *Rights Against Rules*, *supra* note 2; Marc Isserles's article, *supra* note 6; and Professor Fallon's Commentary *As-Applied and Facial Challenges*, *supra* note 1; as well as a more focused literature discussing facial challenges in the area of abortion rights, see Adler, *Rights Against Rules*, *supra* note 2, at 154 n.527 (citing sources).

<sup>55</sup> See *Salerno*, 481 U.S. at 745.

<sup>56</sup> Fallon suggests that *Rights Against Rules* is ambiguous about the possibility of "as-applied" challenges. See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1329 n.43. He contrasts my statement that "as-applied" challenges are "consistent" with rule-dependent doctrine with my later statement that "[t]here is no such thing as a true as-applied constitutional challenge." *Id.* (quoting Adler, *Rights Against Rules*, *supra* note 2, at 157); *id.* at 1328 n.38 (same). But there was no real ambiguity, on this score, in *Rights Against Rules*. I was quite careful to say that "as-applied" challenges in one sense (challenges that vindicate the personal rights of claimants) do not exist, but that "as-applied" challenges in a different and weaker sense (challenges that make reference to facts about the claimant, which in turn I construe as partial invalidations of rules) do exist. See Adler, *Rights Against Rules*, *supra* note 2, at 106 ("So-called 'as-applied' decisions must be interpreted [within the Adler Model] as partial invalidations."). My statement that "[t]here is no such thing as a true as-applied constitutional challenge," *id.* at 157, was immediately followed by this footnote (which Fallon acknowledges):

By this I mean just that constitutional litigation does not concern the morality of the application of a rule to a particular claimant; it does not concern whether the claimant's treatment should be overturned, independent of further invalidating the rule. "As-applied" adjudication in the (less robust) sense of adjudication that depends, in part, on facts about the claimant [i.e., adjudication that eventuates in partial rather than facial invalidation] is quite consistent with the [Adler Model].

*Id.* at 157 n.541.

depends on constitutional norms and may vary depending on the constitutional provision at stake.

The Fallon Model is also inconsistent with the *Salerno* Doctrines. Whereas for Adler, all constitutional challenges are facial challenges, for Fallon, all constitutional challenges are *as-applied* challenges. As Fallon puts it: "[A]ll challenges to statutes are in an important sense as-applied: A litigant must always maintain that a statute cannot lawfully be invoked against her."<sup>57</sup> And again:

In suggesting that facial challenges are best understood as outgrowths of as-applied adjudication, I do not mean to deny that facial challenges occur, or that they are important. Courts sometimes determine, and even more frequently are asked to determine, that entire statutes, and not merely particular subrules, are invalid. Rather, my submission is that facial challenges are less categorically distinct from as-applied challenges than is often thought. To succeed with a constitutional claim in a case involving a statute, the challenger must always show that the statute has no valid subrule that can, under applicable law, be enforced against her.<sup>58</sup>

According to the Fallon Model, the "merits" stage of every constitutional case (at least when doctrine is rule-dependent) addresses one and the same issue: Is there a valid severable subrule covering the claimant? To be sure, it may sometimes be the case that (1) the invalidity of a given rule "infects" all its severable subrules (for example, when the legislature was motivated by an improper purpose in enacting the rule),<sup>59</sup> or (2) the only severable subrule of the rule is the rule itself (given limits on permissible reformulations and/or severability).<sup>60</sup> In both of these scenarios, the personal circumstances of the claimant become irrelevant, and judicial review in a sense becomes "facial" review. But the Fallon Model denies (*pace* the *Salerno* Doctrines) that there exist two distinct structures, "facial" and "as-applied," for a viable constitutional challenge. A constitutional claimant always adduces the very same complaint, namely the absence of a valid severable subrule covering her.<sup>61</sup>

<sup>57</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1326; see also *id.* at 1324 ("[I]t is more misleading than informative to suggest that 'facial challenges' constitute a distinct category of constitutional litigation. Rather, facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation.").

<sup>58</sup> *Id.* at 1341 (footnote omitted).

<sup>59</sup> See *id.* at 1338.

<sup>60</sup> See *id.* at 1346-48.

<sup>61</sup> I think this is true even when the Fallon Model is understood to include the possibility of "overbreadth," that is, a proviso limiting the specification and severance of the challenged rule such that the only severable subrule of that rule is the rule itself. See *supra* pp. 1382-83 (describing the overbreadth feature, and explaining that this Response will generally ignore that feature when assessing the Fallon Model). Even in the overbreadth case, the Fallonian structure of constitutional challenges does not change: the claimant still asserts the absence of a valid severable subrule covering her, with the set of severable subrules now drastically limited. See Fallon,



It might be argued that the Adler Model is more deeply inconsistent with the *Salerno* Doctrines than the Fallon Model, and that the doctrines should therefore be taken as a factor in Fallon's favor. The *Salerno* Doctrines see as-applied challenges as the primary kind of constitutional challenge; Fallon replaces primacy with exclusivity, by making as-applied challenges the exclusive kind of constitutional challenge, while the Adler Model goes much further, and in the opposite direction, by denying that *any* constitutional challenges are as-applied. But in fact (as far as I can tell) Fallon does not invoke the *Salerno* Doctrines as a consideration favoring his model, and with good reason.

The *Salerno* Doctrines have official status: they were adopted by a full-fledged majority opinion, and have since been reaffirmed more than once by full-fledged majority opinions.<sup>62</sup> But the doctrines are strikingly at odds with the Court's results in many constitutional cases. The Court has frequently sustained facial challenges to rules — for example, in the series of cases striking down state statutes regulating abortion — even though the claimants could not invoke the First Amendment overbreadth doctrine, and despite the fact that the challenged statutes seemingly had some constitutional applications.<sup>63</sup> Even *Salerno's* strongest proponent, Justice Scalia, admits that “in some recent facial-challenge cases the Court has, without any attempt at explanation, created entirely irrational exceptions to the ‘unconstitutional in every conceivable application’ rule.”<sup>64</sup> Relatedly, the Court has adopted substantive constitutional tests that are at odds with the *Salerno* Doctrines. One of the most notable examples is the “undue burden” test adopted in *Casey*, which apparently makes a law regu-

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*As-Applied and Facial Challenges*, *supra* note 1, Part II, at 1342–59 (analyzing various types of facial challenges, including overbreadth challenges, as outgrowths of the basic as-applied structure).

Assume I am wrong — that the Fallon Model is best understood as creating two distinct types of constitutional challenges, “facial” and “as-applied.” In that case the correspondence between the Fallon Model and the *Salerno* Doctrines *would* be much closer than the correspondence between the Adler Model and those doctrines; but I would still insist that the doctrines should have little force in deciding between the models, given the generally confused state of the Court's jurisprudence (including but not limited to the *Salerno* Doctrines) governing facial and as-applied challenges. See *infra* pp. 1390–91 (noting the Court's confusion).

<sup>62</sup> See *Reno v. Flores*, 507 U.S. 292, 301 (1993); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); see also *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (quoting *Salerno* in the context of a non-constitutional facial challenge to a state law, claiming a violation of federal regulations).

<sup>63</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 128 n.425, 156 n.539 (citing cases).

<sup>64</sup> *City of Chicago v. Morales*, 119 S. Ct. 1849, 1871 (1999) (Scalia, J., dissenting). It might be noted that none of the opinions in the Court's most recent “facial challenge” case, *Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S. Ct. 483 (1999), even mention *Salerno*. *Los Angeles Police* is not a case in which the Court departed from *Salerno* (because the facial challenge failed), but it still supports my claim that the *Salerno* Doctrines do not have anything near the status of an accepted and settled rule that reliably determines how the Court resolves facial challenges.



lating abortion facially invalid if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."<sup>65</sup>

In a recent article, Marc Isserles has advanced a clever argument to reconcile the abortion cases and others sustaining facial challenges with the *Salerno* Doctrines. Because those rules were invalid under applicable tests, and because there is a constitutional right not to be sanctioned under an invalid rule (which every application of each of those rules would violate), it follows that each of those rules was unconstitutional in every application, as per *Salerno*.<sup>66</sup> The difficulty with this account of the case law sustaining facial challenges is that it renders the First Amendment overbreadth doctrine (reaffirmed by *Salerno* as a separate category of facial challenge) quite superfluous. If an overbroad statute regulating abortion violates the personal rights of each person thereby regulated not to be sanctioned or otherwise harmed by the application of an invalid rule to her, why not say the same about an overbroad statute regulating speech?<sup>67</sup> In short, the *Salerno* Doctrines are "reconcilable" with the numerous Supreme Court decisions sustaining facial challenges only at the cost of changing the doctrines themselves — by eliminating the overbreadth category, and by construing the concept of an unconstitutional rule-application to include *any* application of an invalid rule, which is quite different from what *Salerno* seems to mean by that concept.

This tension between the *Salerno* Doctrines and the Court's actual pattern of facial invalidations is a major basis, I believe, for the continuing and vigorous disagreement among the Justices about the meaning and correctness of those doctrines.<sup>68</sup> It is also a sufficient basis not to use those doctrines as a tool for adjudicating between the Adler Model and the Fallon Model. The *Salerno* Doctrines are one part of a larger body of Supreme Court case law, and this larger case law is — to be frank — confused and incoherent on the issue of "facial" and "as-applied" challenges.

In Professor Fallon's words, "[I]t is tempting to say that the Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation."<sup>69</sup> Any decent model of rule-dependent adjudication, whether the

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<sup>65</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992).

<sup>66</sup> See Isserles, *supra* note 6, at 385-421.

<sup>67</sup> See *id.* at 421 ("Whether it is possible to preserve an independent role for First Amendment overbreadth doctrine in light of valid rule facial challenges is an extraordinarily difficult question that may be put aside for present purposes.")

<sup>68</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 11 n.39 (citing cases in which the Justices have debated the propriety of facial invalidation).

<sup>69</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1323.



Adler Model, the Fallon Model, or the related models proposed by Dorf, Isserles, and Monaghan, is bound to be contradicted by some portion of the Court's jurisprudence on facial and as-applied challenges. These models purport to bring much-needed order and coherence to that jurisprudence, and should be evaluated in light of other, more settled constitutional doctrines and understandings with which that body of law (however revamped) would need to coexist.

### B. The Personal Rights Thesis

The Supreme Court has repeatedly stated that constitutional adjudication functions to vindicate "personal rights." Consider the following, classic statement from *Broadrick v. Oklahoma*:<sup>70</sup>

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court . . . .<sup>71</sup>

Similar statements are contained in numerous other Supreme Court cases.<sup>72</sup>

I suggest that the thesis, articulated in *Broadrick* and elsewhere, about the connection between constitutional adjudication and personal rights can be summarized as follows:

*The Personal Rights Thesis:* For a person *P* to have the legal power to secure judicial relief against an unconstitutional government action, it is (normally) a necessary condition that the action invade her personal rights.

The Personal Rights Thesis states that the tenure of personal rights is "normally" — not "always" — a necessary condition for the power to secure constitutional relief, because certain special doctrines (such as the overbreadth doctrine or third-party standing doctrines) explicitly confer that power upon persons who lack personal rights. *Broadrick*

<sup>70</sup> 413 U.S. 601 (1973).

<sup>71</sup> *Id.* at 610–11 (citations omitted).

<sup>72</sup> See, e.g., *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 120 S. Ct. 483, 488 (1999); *Osborne v. Ohio*, 495 U.S. 103, 112 n.8 (1990); *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (plurality opinion); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *United States v. Raines*, 362 U.S. 17, 20–22 (1960).

recognizes the existence of such doctrines<sup>73</sup> but asserts that they are quite special and that the standard constitutional complaint asserts the violation of the claimant's personal rights.<sup>74</sup>

What does it mean for an unconstitutional government action *A* to invade the "personal rights" of a given person *P*? I suggest the following: *A* "personal constitutional right," whatever it consists in, is different from — and more robust than — a justified power to secure judicial relief.<sup>75</sup> For it to be the case that governmental action *A* invades *P*'s personal rights, more must be true of *P* than the mere fact that *P* justifiably possesses the power to secure judicial relief against *A*.<sup>76</sup> Why do I say this? I say this because the notion of "personal rights" is asserted by the Court in contradistinction to the overbreadth and third-party standing doctrines, which are doctrines that do confer powers to secure judicial relief (presumably justified) upon certain claimants but do not (yet) make them personal rights-holders.

For example, the overbreadth doctrine, as articulated by the Court, says that the overbreadth claimant *O* has the power to secure an invalidation of an overbroad statute regulating speech, even though *O*'s "own" or "personal" rights are not violated by the statute.<sup>77</sup> Further, the overbreadth doctrine is presumably justified in light of First Amendment values, or at least thought to be justified by the Court; if the Court thought otherwise, there would be no such doctrine. So (in the Court's view) *O* holds the justified power to secure judicial relief against an overbroad statute, even though the statute does not violate *O*'s personal rights. If personal constitutional rights are merely justified powers to secure judicial relief, this classic understanding of overbreadth is incoherent.

Fallon might be happy to say that this classic understanding of overbreadth is incoherent. But he does not think that the classic understanding of third-party standing is. Fallon nicely summarizes this

<sup>73</sup> See *Broadrick*, 413 U.S. at 611–15 (delineating exceptions to the personal rights model); see also *Raines*, 362 U.S. at 22–23 (same).

<sup>74</sup> *Broadrick*, 413 U.S. at 610–15.

<sup>75</sup> *Rights Against Rules* used the term "constitutional right" to signify merely a justified legal power — not a "personal right" in some more robust sense — and was quite explicit about that. See Adler, *Rights Against Rules*, *supra* note 2, at 25.

<sup>76</sup> See generally Adler, *Personal Rights and Rule-Dependence*, *supra* note 23 (explaining the Personal Rights Thesis and the concept of a "personal right" generally).

<sup>77</sup> Adler, *Rights Against Rules*, *supra* note 2, at 142–45 (discussing overbreadth case law). For scholarly treatments of the overbreadth case law, see Lawrence A. Alexander, *Is There An Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541 (1985); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Martin Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).



understanding: "[T]he Court has authorized third-party standing whenever a practical impediment makes it difficult for a right-holder to assert her own rights and some relation exists between the right-holder and the party asserting third-party standing."<sup>78</sup> And he adds: "Although many purported third-party standing cases can be conceptualized as involving personal rights . . . other cases do not fit the first-party mold so well."<sup>79</sup> In short, Fallon and the Court believe that there are some constitutional litigants — genuine "third-party" claimants — who do not assert their own personal rights but rather the personal rights of those to whom they are sufficiently related. If personal constitutional rights are merely justified powers to secure judicial relief, this view of third-party standing is incoherent. Why? Assume that Fallon and the Court believe that *T* has third-party standing to challenge a particular governmental action. *T*, then, has the legal power to secure judicial relief against that action; further, Fallon and the Court would not want to confer that power upon *T* unless they thought the power was constitutionally justified. But if Fallon and the Court take personal rights to be nothing more than justified legal powers, then (in their eyes) *T* is a full-fledged personal rights-holder, which contradicts the premise that he merely possesses third-party standing.

I do not think the classic overbreadth doctrine is incoherent. Nor do I think that classic third-party standing doctrine is incoherent.<sup>80</sup> The Court, in *Broadrick* and elsewhere, is drawing a perfectly sensible distinction between those who merely hold a justified power to secure judicial relief, and those whose personal rights are violated (in some more robust sense) by unconstitutional governmental action. Where, exactly, does that distinction lie? I do not have a clear answer. Nor does the Court. Nor, for that matter, do the generations of jurispru-

<sup>78</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1359–60; see also Adler, *Rights Against Rules*, *supra* note 2, at 162–64 (discussing third-party standing case law). For scholarly treatments of this case law, see Monaghan, *Third Party Standing*, *supra* note 7; Robert Allen Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

<sup>79</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1362.

<sup>80</sup> So as to avoid possible confusion on this score, I should make clear that *Rights Against Rules* did not claim third-party standing doctrine to be incoherent. Rather, the view stated there (and one I am happy to reaffirm here) was that third-party standing is a misguided category *insofar as constitutional doctrine is rule-dependent*. More specifically: (1) Insofar as constitutional doctrine is rule-dependent, constitutional claimants are merely the holders of justified legal powers to secure legal relief, rather than personal rights-holders; (2) persons with third-party standing do hold a justified legal power to secure judicial relief; therefore (3) third-party standing is a mistaken category, insofar as doctrine is rule-dependent. See Adler, *Rights Against Rules*, *supra* note 2, at 162–65 (presenting, in effect, this argument). This argument is perfectly consistent with the view (one I also hold) that there is a coherent distinction between third-party standing and personal rights-holding, and that — insofar as constitutional doctrine is *not* rule-dependent — third-party standing is a perfectly acceptable doctrinal category.

dential scholars, from Bentham to Hart to Dworkin, MacCormick, and Raz, who have argued without clear resolution about the nature of (personal) rights.<sup>81</sup> The concept of "personal rights" is a general one, which admits of multiple and conflicting conceptions that make the concept more precise.<sup>82</sup> For example, we might say that unconstitutional action *A* invades *P*'s personal rights if the action causes a constitutionally distinctive harm to *P*, and if the court is justified in remedying that harm, independent of remedying any harms to other persons that flow from *A*. Or, we might say that unconstitutional action *A* invades *P*'s personal rights if *A* breaches a special kind of constitutional duty — a relational duty — that the government owes to *P*. Or, we might say that unconstitutional action *A* invades *P*'s personal rights if the action invades some aspect of *P*'s well-being sufficiently weighty and basic to constitute a "trump" over considerations of general social welfare. Note that each of these plausible variants of the general concept of "personal rights" posits some more robust connection between *P* and an unconstitutional governmental action than her mere tenure of a justified power to secure judicial relief against that action.<sup>83</sup>

So much for the Personal Rights Thesis and the notion of "personal rights" that it incorporates. Does this thesis count in favor of the Fallon Model, as against the Adler Model? The Adler Model confers the power to secure judicial relief upon anyone with Article III standing — anyone who would benefit from the repeal or amendment of an invalid rule. Clearly, then, the Adler Model is inconsistent with the Personal Rights Thesis. Whatever, precisely, is meant by "personal rights," it seems quite clear that holding personal rights must mean more than merely possessing Article III standing.<sup>84</sup> What about the

<sup>81</sup> Illuminating overviews of (and entries in) this jurisprudential debate include Matthew H. Kramer, *Rights Without Trimmings*, in MATTHEW H. KRAMER, N.E. SIMMONDS, & HILLEL STEINER, *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* 7 (1998); L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* (1987); and Jeremy Waldron, *Introduction*, in *THEORIES OF RIGHTS* 1 (Jeremy Waldron ed., 1984). The Kramer article also contains comprehensive citations to the current jurisprudential literature on rights.

<sup>82</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134–36 (1977) (distinguishing between general moral concept and specific conception of that concept).

<sup>83</sup> See generally Adler, *Personal Rights and Rule-Dependence*, *supra* note 23 (presenting and discussing these and other particular understandings of a "personal constitutional right").

<sup>84</sup> I say this because *Broadrick* and other cases in which the Court articulates the Personal Rights Thesis make clear that an individual who (1) holds a justified power to secure judicial relief against an unconstitutional governmental action, and (2) possesses Article III standing to secure relief against that action, is not — without more — someone whose "personal rights" have been infringed by the unconstitutional action. For example, both overbreadth claimants and individuals with third-party standing satisfy the two conditions just stated (in the Court's view) and yet are not (in the Court's view) personal rights-holders. See Adler, *Personal Rights and Rule-Dependence*, *supra* note 23 (manuscript at 18, 20, 45–47) (explaining that an individual does not



Fallon Model? That model generally reserves to those persons to whom invalid rules have been applied the power to secure a judicial remedy against invalid rules. If it is true that applying an invalid rule to *P* violates her personal rights, then the Fallon Model will be consistent with the Personal Rights Thesis, and this oft-articulated principle will count as a plausible consideration in that model's favor.

We have now reached the crucial question for evaluating the Fallon Model: the question that determines whether Fallon can claim the support of the Personal Rights Thesis and (as we shall see below in section III.C) whether Fallon can criticize the Adler Model for failing to vindicate the alleged right not to be sanctioned under an invalid rule. *Does the application of an invalid rule to P violate her personal rights?* Fallon believes the answer is yes. His Commentary contains a number of statements like the following: "[T]he 'valid rule requirement' [is] the notion that everyone has a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law. Within my understanding of constitutional law, the valid rule requirement is fundamental."<sup>85</sup> In making such statements, Fallon neglects to address the arguments to the contrary that I advanced in *Rights Against Rules*.

*Rights Against Rules* had three main parts. The first part was a defense of the rule-dependence thesis;<sup>86</sup> the third part was an articulation of the Adler Model;<sup>87</sup> the second part, some fifty pages, was devoted to showing why the application of an invalid rule to a given person *P* does *not* violate her personal constitutional rights.<sup>88</sup> More recently, I have bolstered the arguments presented in the second part of *Rights Against Rules*. My paper, *Personal Rights and Rule-Dependence*, is devoted in substantial part to defending the claim that the applications of invalid rules do not violate personal rights (on any plausible conception of the notion of a "personal right").<sup>89</sup> And yet Fallon does not, in any significant way, attempt to address the substantive analysis presented in the second part of *Rights Against Rules* and in *Personal Rights and Rule-Dependence*.<sup>90</sup>

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hold a "personal right," as that concept is understood by the Court, merely because she possesses Article III standing).

<sup>85</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331 (footnote omitted). For similar statements, see *id.* at 1327, 1331 n.57, 1349, 1360-61, 1362 & n.212, 1369.

<sup>86</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 13-39.

<sup>87</sup> See *id.* at 91-152.

<sup>88</sup> See *id.* at 39-91.

<sup>89</sup> See Adler, *Personal Rights and Rule-Dependence*, *supra* note 23. This paper has not yet been published, but it was presented at a symposium on "Rights and Rules" that Professor Fallon and I both attended.

<sup>90</sup> Both in the second part of *Rights Against Rules*, *supra* note 2, and in *Personal Rights and Rule-Dependence*, *supra* note 23, I argue that the application of an invalid rule *R* to *P* does not violate *P*'s personal constitutional rights, insofar as the relevant constitutional norms are moral

I will not repeat, or even summarize, my various arguments that the application of an invalid rule to a given person does not violate his personal constitutional rights.<sup>91</sup> The arguments are too lengthy and complex for an easy summary. Perhaps Fallon thinks that the "Valid Rule Principle" (that the application of an invalid rule violates personal rights) is so obviously correct that arguments to the contrary, like mine, do not merit a response. The Valid Rule Principle may be cor-

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norms. See, e.g., Adler, *Rights Against Rules*, *supra* note 2, at 39-44 (describing and defending my focus on moral norms). Professor Fallon has three possible strategies for showing why this argument does not undermine the Valid Rule Principle (leaving aside a purely doctrinal strategy, which I will discuss in a moment, see *infra* pp. 1400-01). First, he might try to demonstrate that the argument is just wrong. Second, he might acknowledge that the argument could be correct, but try to demonstrate that the application of an invalid rule *R* to *P* does violate *P*'s personal rights when *R* is not merely invalid but lacks any valid severable subrule covering *P*. Third, he might acknowledge that the argument could be correct, but try to demonstrate that constitutional norms are not moral norms, and that *P*'s personal rights are violated by the application of an invalid rule *R* to *P* when *R* is invalid in light of these nonmoral constitutional norms. Fallon pursues none of these strategies in his Commentary.

Fallon does argue in a footnote that my denial of the Valid Rule Principle creates a "bizarre disjunction":

A person who is harmed by official misconduct unauthorized by any rule — for example, someone who is denied a job because she is a woman, a Catholic, or a Republican — suffers the violation of a "personal" constitutional right not to be discriminated against on the grounds of gender, religion, or political affiliation; but if the same person were denied the same job pursuant to a rule discriminating against women, Catholics, or Republicans, no personal right would have been violated . . . .

Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1366 n.229. Fallon's argument, in brief, is that the action of a governmental official that is motivated by constitutionally invalid reasons violates personal rights, and therefore the action of a governmental official that is performed pursuant to constitutionally invalid rules must also violate personal rights. But I would not accept the proposition that the action of a governmental official that is motivated by constitutionally invalid reasons violates personal rights. Fallon has not shown the proposition to be true; he simply takes it to be true, and (incorrectly) assumes that I also do. Although the truth of this proposition is not an issue I considered in *Rights against Rules* or *Personal Rights and Rule-Dependence*, the arguments advanced there against the Valid Rule Principle would also tend to undermine the claim that improperly motivated governmental actions violate personal rights. Constitutional reviewing courts, in invalidating such actions, need not be vindicating personal rights, but might (for example) be repealing or amending informal governmental practices that, overall, violate constitutional norms, just as constitutional reviewing courts, in issuing remedies against invalid legal rules, need not be vindicating personal rights but might (for example) be repealing or amending those rules. See *infra* Part IV, pp. 1412-20 (describing and comparing various models of rule-dependent constitutional adjudication that do not vindicate personal rights).

<sup>91</sup> Assume Fallon succeeds in overcoming these arguments, using one of the three strategies mentioned above in note 90. A further issue he would then need to confront — and which again is not discussed in his Commentary — is why the application of an invalid rule *R* to *P* violates *P*'s personal rights even though the doctrinal tests for rule (or subrule) validity do not directly incorporate underlying constitutional norms. See *supra* pp. 1376-77 (observing that the Fallon Model, like the Adler Model, permits a divergence between constitutional norms and doctrinal tests). Take the case where *R* is valid in light of constitutional norms, but invalid in light of prophylactic tests and, indeed, lacks any severable subrules that are valid in light of these tests. Why would we think that *P*'s personal constitutional rights (in any sense of personal right more robust than a justified legal power) are violated in this scenario?



rect, but I do not think it is obviously correct; we need to debate its correctness, and Fallon's Commentary fails to enter that debate. Not only does Fallon fail to engage my arguments against the Valid Rule Principle; he fails to present a case on its behalf, at least in this Commentary, other than the relatively cursory case contained in the following paragraph:

Within my understanding of constitutional law, the valid rule requirement is fundamental. Its roots lie in the history and structure of the Constitution and in the deeper values that the Constitution serves. The notion that an "invalid law" is not law at all underlies *Marbury v. Madison*. And the foundations of *Marbury*, in turn, inhere in the ideal of the rule of law, which demands that "[t]he law should rule officials, including judges," and precludes them from imposing legal disabilities not authorized by (valid) law. This ideal explains why it is almost universally acknowledged that criminal defendants must be set free when the statutes under which they were convicted are held invalid (under the First Amendment, for example), even when their conduct is not absolutely privileged against governmental regulation, and even when a lawmaking authority has attempted to prohibit their conduct. . . . Through the history of American constitutionalism, there has been wide debate about which (if any) "remedies" for constitutional violations are constitutionally required, but never about the proposition that a defendant cannot be sanctioned without the authority of a valid law. As a result, it is hard to identify direct judicial affirmations of the valid rule requirement, though a doctrinal home could easily be found in the Due Process Clause: due process forbids sanctions unless a defendant had fair notice of a valid rule of law.<sup>92</sup>

Fallon here appears to conflate (1) the personal right not to be sanctioned without fair notice, with something very different, namely (2) the personal right not to be sanctioned or otherwise harmed pursuant to a constitutionally invalid rule. I will happily concede that individuals do indeed have a personal right not to be sanctioned without fair notice. If *P* performs some constitutionally proscribable action (an action such that there exists some hypothetical, valid rule proscribing it, for example, an action of homicide, assault, theft, pollution, securities fraud, drug use, or displaying child pornography), and if *P* is sanctioned by a court for that action even though no actual legal rule covering the action was in force at the time *P* performed it, then *P*'s personal rights are indeed violated by the sanction — for lack of fair notice — notwithstanding the fact that the action was constitutionally proscribable.<sup>93</sup> But fair notice can readily be provided by a nonvague

<sup>92</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331–33 (footnotes omitted).

<sup>93</sup> See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").



rule that happens to be constitutionally invalid in the sense that it runs afoul of the Free Speech Clause, the Free Exercise Clause, the Equal Protection Clause, or some other provision of the Bill of Rights. If *P* performs a constitutionally proscribable action, and this action violates a clear, preexisting legal rule — “existing” and “legal” in the sense that the rule was duly enacted by Congress in accordance with the procedures for promulgating statutes set forth in Article I of the Constitution, or by a state legislature in accordance with the parallel procedures of its state constitution — and *P* is sanctioned pursuant to that rule, then no personal right of *P* is violated even though the rule is overbroad, discriminatory, underinclusive, improperly motivated, or otherwise invalid under some constitutional rule-validity test grounded in the Bill of Rights. Or so I want to claim, and have argued at length in *Rights Against Rules* and *Personal Rights and Rule-Dependence* — without any substantive rebuttal, as yet, by Fallon or the other proponents<sup>94</sup> of the claim that the application of an invalid rule violates personal rights.<sup>95</sup>

<sup>94</sup> Monaghan's work on rule validity precedes *Rights Against Rules*, see sources cited *supra* note 7, and in any event the arguments he provides there in support of the Valid Rule Principle are fairly cursory. I do not mean to gainsay the seminal importance of Monaghan's work in presenting that principle and in showing how the Court's overbreadth doctrine could be reinterpreted in light of it. But I share Michael Dorf's assessment that “Monaghan offers no argument or authority for a general right to be judged by a valid rule of law.” Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 5, at 244 n.31.

Dorf himself does not espouse the Valid Rule Principle, understood as the principle that the application of an invalid rule violates personal rights. See *Personal Communication* with Michael C. Dorf, Professor of Law, Columbia University School of Law (Jan. 18, 2000). His arguments in *Facial Challenges to State and Federal Statutes* are not intended to defend that principle, and his recent paper, *The Heterogeneity of Rights*, endorses (rather than rebuts) the criticisms of the Valid Rule Principle that I offered in *Rights Against Rules*. See Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 5, at 242–49; Dorf, *The Heterogeneity of Rights*, *supra* note 5 (manuscript at 19 n.68) (“I find convincing Adler's claim that such a right [against invalid rules] is a legal rather than a moral right. There is no direct entitlement to be judged by a valid rule, but the Constitution forbids a court from enforcing an unconstitutional law, and thus courts will treat litigants exactly as though they have a right to be judged only by unconstitutional rule[s] of law[.]” (citations omitted) (internal quotation marks omitted)). Instead — as the just-quoted language suggests — Dorf believes that persons possess a legal right, that is, a justified legal power, to overturn their treatment pursuant to invalid rules. I am not persuaded by his arguments for this proposition, but, even if good, they do not establish Fallon's different and more robust claim that applications of invalid rules violate personal rights.

Finally, Isserles's case for the Valid Rule Principle is very limited. He simply asserts that “scholars have not seriously undermined Monaghan's central claim that litigants have a right to be judged under a constitutionally valid rule of law,” and defends this statement with a brief summary of Fallon's, Dorf's, and Monaghan's scholarship, plus a “but see” citation to *Rights Against Rules*. Isserles, *supra* note 6, at 389 & n.142.

<sup>95</sup> Notably, Lon Fuller, in his famous work *THE MORALITY OF LAW* (rev. ed. 1969) — which attempts to delineate the moral requirements that any legal system must satisfy if it is to be a “legal system” at all — identifies “fair notice” as one such requirement, see, e.g., *id.* at 58, but nowhere discusses the putative right against the application of a constitutionally invalid rule, much less suggests that it has a similar status. Fallon himself has previously distinguished between the



Perhaps the Valid Rule Principle — that the application of an invalid rule violates personal rights — is so deeply embedded in the Court's jurisprudence that constitutional lawyers and scholars should simply accept the principle, whether or not it is correct. (Perhaps this is what Fallon means when he says in the above-quoted paragraph that "[t]hrough the history of American constitutionalism" there has "never" been debate about the Valid Rule Principle.)<sup>96</sup> I did not examine the doctrinal status of the Valid Rule Principle in any detail in *Rights Against Rules* or *Personal Rights and Rule-Dependence*, and do not have the space to undertake that examination here.<sup>97</sup> However, I

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right to "fair notice" and the right not to be sanctioned pursuant to an invalid rule. See Fallon, *Making Sense of Overbreadth*, *supra* note 77, at 875–77 & n.128.

<sup>96</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1332–33.

<sup>97</sup> I should, however, respond to Fallon's interpretation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). He states: "The notion that an 'invalid law' is not law at all underlies *Marbury v. Madison*." Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1332. *Marbury* certainly does state that "an act of the legislature repugnant to the constitution is void," indeed "entirely void" and "not law." *Marbury*, 5 U.S. (1 Cranch) at 177, 178. However, *Marbury* does not go on to say that the application of a constitutionally invalid law violates personal rights. The issue in that case, of course, was whether the Constitution permitted the Supreme Court to take jurisdiction over *Marbury*'s statutory challenge to the nondelivery of his commission, not whether some sanction or other setback authorized by statute violated *Marbury*'s constitutional rights. But Fallon takes the premise, endorsed by *Marbury*, that constitutionally invalid laws are "void," to imply the conclusion that the application of a constitutionally invalid law violates personal rights.

Fallon's reasoning, I take it, goes something like this: (1) a constitutionally invalid law is entirely void and not law, in just the same way as a proposed statute that failed to secure a majority of votes in Congress, or some other nonenacted text, is entirely void and not law; (2) sanctioning a given person *P*, pursuant to a nonenacted text, violates her personal rights (because it deprives her of "fair notice"); therefore (3) sanctioning a given person *P*, pursuant to a constitutionally invalid law, violates her personal rights. This syllogism relies upon the putative equivalence of a constitutionally invalid law, and a nonenacted text. Does *Marbury* really stand for the proposition that there is such an equivalence? Does it really endorse the major premise of the syllogism just sketched out? If it does, then the *Marbury* opinion is at war with itself, because — as Fallon himself notes — the opinion also assumed that the Judiciary Act would remain in force insofar as it conferred appellate rather than original jurisdiction on the Court:

*Marbury* provides an especially nice illustration of the extent to which constitutional practice presupposes that statutory rules — understood as linguistic units — can and should be treated as comprising severable subrules. In *Marbury*, the Court held that a provision of the 1789 Judiciary Act authorizing the Supreme Court to issue writs of mandamus was invalid insofar as that provision attempted to confer original Supreme Court jurisdiction. [Citation to *Marbury*, 5 U.S. (1 Cranch) at 173–75.] But the Court did not invalidate that linguistic unit of the statute insofar as it authorized the Supreme Court to issue writs of mandamus in the exercise of its *appellate* jurisdiction. [Citation to *id.* at 175.]

Fallon, *supra* note 1, at 1337 n.91. Had the Judiciary Act been nonenacted — had it been merely a set of words that Congress had never promulgated — then it would not properly have been understood to confer appellate jurisdiction on the Court or to have any other legal effect. I thus do not read *Marbury* to endorse an equivalence between constitutionally invalid law and nonenacted text.

Assume my reading of *Marbury* is incorrect. If so, *Marbury* does imply that the application of a constitutionally invalid rule violates personal rights — it does imply the Valid Rule Principle



am quite skeptical that the principle is so clearly accepted by the Court, and constitutes a sufficiently fundamental premise of the Court's doctrines, that substantive arguments against the principle are misplaced.

Neither Fallon nor other proponents of the Valid Rule Principle have demonstrated to the contrary. It is one thing to argue (as Fallon, Isserles, and Monaghan<sup>98</sup> have) that a creative reformulation of the Supreme Court case law that gives prime place to the Valid Rule Principle is possible; it is quite another to show that the principle has been so consistently, explicitly, and unequivocally avowed by the Court that its cogency has become irrelevant and that any jurisprudential model (like the Adler Model) that denies it must be rejected.

Consider, for example, the Court's opinion in the seminal case *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Co.*,<sup>99</sup> in which a railroad challenged an adverse judgment pursuant to a statute requiring it to settle "all claims" for lost or damaged freight:

[C]ounsel for the railway company urge that the statute is not confined to cases like the present, but equally penalizes the failure to accede to an excessive or extravagant claim . . . [T]he argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as-applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now.<sup>100</sup>

I concede that this language can be interpreted as consistent with the Valid Rule Principle, if (as Fallon suggests) the principle applies to subrules, not rules, and if notions of severability are brought into play. But *Yazoo* on its face *rejects* the Valid Rule Principle; at a minimum, the opinion evidences no commitment to that principle sufficiently

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— but it also undermines Fallon's own model of constitutional adjudication. Imagine that a constitutionally invalid federal or state statute *R* is just the same, constitutionally speaking, as a mere set of words that was never enacted by Congress or the state legislature. Then *any P* sanctioned pursuant to *R* should have a valid constitutional challenge, just as any person sanctioned pursuant to a merely proposed but nonenacted statute would; the fact that *R* has some valid severable subrule covering *P* ought not vitiate *P*'s challenge. See *infra* pp. 1404–06 (explaining that both the Adler Model and the Fallon Model violate the "strong form" of the Valid Rule Principle). Further, even if *Marbury* does endorse the proposition that constitutionally invalid law and nonenacted text are equivalent, that proposition is not so deeply embedded in the constitutional case law that scholars should simply take it as true. For example, the proposition is rejected by later Supreme Court cases such as *Yazoo*, *Raines*, *Broadrick*, and *Salerno*, as I read them. See *infra* pp. 1400–01.

<sup>98</sup> I do not include Dorf in this list for reasons explained above in note 94.

<sup>99</sup> 226 U.S. 217 (1912).

<sup>100</sup> *Id.* at 219–20.



clear that any constitutional lawyer must simply accept the principle as true. A similar absence of any explicit avowal or recognition of the principle — let alone a deep commitment to it — is evident in contemporary cases grounded upon *Yazoo*, such as *Salerno*, *Broadrick*, or the case on which Fallon relies so heavily, *Raines*. Indeed, as Isserles has conceded in an article defending a model of constitutional adjudication similar to Fallon's: "[T]he Court has never used the term 'valid rule' challenge to explain the valid rule alternative . . ."<sup>101</sup> Isserles is therefore forced to argue that the Court's recognition of the valid rule principle is "implicit."<sup>102</sup>

Fallon, in passing, tries to bolster his case for the Valid Rule Principle by deflating the concept of "personal rights":

[S]ome constitutional rights are reasonably granted to all as safeguards against abuses of power, potentially threatening to nearly everyone, that might occur in the absence of such rights. . . . In my view, the valid rule requirement . . . falls within the category of rights that are adequately defensible on this ground.<sup>103</sup>

Fallon seems to be saying here that a "personal right" is simply a justified legal power — the Valid Rule Principle merely claims that it is justifiable to confer upon rule-subjects the power to secure judicial relief against sanctions imposed upon them pursuant to invalid rules.<sup>104</sup> But as I argued above, the notion of "personal rights" employed by the Court — and incorporated in the jurisprudential principle I have summarized as the Personal Rights Thesis — must be more robust than the notion of a justified legal power.<sup>105</sup> Moreover, Fallon's deflationary equation of personal rights and justified legal powers, in the paragraph just quoted, is inconsistent with his embrace of the distinction between personal rights and third-party standing — again, for reasons explained earlier.<sup>106</sup>

In sum, the Personal Rights Thesis, adopted by the Court in *Broadrick* and other cases, says that in order for a person to have the

<sup>101</sup> Isserles, *supra* note 6, at 390–91.

<sup>102</sup> See *id.* at 393; see also Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1333 ("[I]t is hard to identify direct judicial affirmations of the valid rule requirement . . .").

<sup>103</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331 n.57 (citation omitted).

<sup>104</sup> At another point in his Commentary, Fallon seemingly distinguishes between personal rights and justified legal powers. He explains: "In describing a right as 'personal,' I mean only that it involves an interest of the right-holder that substantive legal doctrine directly protects as an aspect of its definition of the right in question." *Id.* at 1360 n.200. As I have elsewhere argued at length, defining "personal rights" in terms of interests is perfectly coherent, and does indeed license a distinction between personal rights and the mere tenure of a justified legal power (such as the mere tenure of third-party standing); but the interest-based conception of "personal rights," like other conceptions, fails to support the Valid Rule Principle. See Adler, *Personal Rights and Rule-Dependence*, *supra* note 23 (manuscript at 15–47).

<sup>105</sup> See *supra* pp. 1391–94.

<sup>106</sup> See *id.*

legal power to secure judicial relief against an unconstitutional government action, the action must normally invade her personal rights. The Adler Model is inconsistent with the Personal Rights Thesis because it confers the power to secure an invalidation of an unconstitutional rule upon anyone who would benefit from that invalidation, whether or not the action of rule-enactment or rule-application violated her personal rights. The Fallon Model confers the power to secure judicial relief against an invalid rule upon anyone sanctioned pursuant to the rule, or otherwise harmed by its application to her. Thus, the Fallon Model would be consistent with the Personal Rights Thesis *if* the detrimental application of an invalid rule, without more, violated personal rights. But it does not — or so I have argued at length elsewhere, and Fallon has not shown to the contrary in his Commentary. Thus the Fallon Model is no more consistent with the Personal Rights Thesis than the Adler Model, and we must look to other factors in choosing between the models.<sup>107</sup>

### C. The Valid Rule Principle

The Valid Rule Principle, already discussed,<sup>108</sup> says the following:

*The Valid Rule Principle:* It violates *P*'s personal rights to be sanctioned or otherwise harmed by the application of an invalid rule to her.

The Adler Model can be criticized for running afoul of the Valid Rule Principle, because my model will sometimes lead constitutional courts to uphold a person's treatment under a rule even though the rule is invalid. In particular: if a court remedies an invalid rule by amending (partially invalidating) the rule rather than facially invalidating it, and if claimant *P* happens to fall within the terms of the amended rule, then (on the Adler Model) the court should uphold *P*'s treatment.<sup>109</sup>

<sup>107</sup> Does this result suggest that we should abandon both the Adler Model and the Fallon Model? I do not think so. I have argued elsewhere that *any* model of constitutional adjudication that preserves rule-dependence will run into conflict with the Personal Rights Thesis. See Adler, *Personal Rights and Rule-Dependence*, *supra* note 23. We are faced with a conflict between two familiar features of current constitutional doctrine, and I do not see why, given the conflict, we are necessarily obliged to give up rule-dependence. Note, in particular, that the Court could give up the Personal Rights Thesis without transgressing limits on the powers of the federal courts, because the absence of personal rights does not imply the absence of Article III standing. See *supra* p. 1394. Relatedly, I think that rule-dependence is a deeper feature of existing doctrines than the Personal Rights Thesis. See Adler, *Personal Rights and Rule-Dependence*, *supra* note 23 (manuscript at 60).

<sup>108</sup> See *supra* pp. 1395–1401.

<sup>109</sup> More precisely, this is true assuming that the constraints of Article III standing do not require the court, in such a case, to facially rather than partially invalidate the rule, or to partially invalidate it but also invalidate *P*'s particular treatment. See *supra* note 36. I will assume, for the sake of argument, that — at least in a case where *P* has a reasonable chance *ex ante* of securing a rule invalidation that benefits him — it would not violate Article III if the Court partially invalidated the rule, but upheld *P*'s own treatment. Cf. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S.



That the Adler Model has this feature is, in fact, one of Fallon's main criticisms of it:

[The Adler Model] implies that a court, upon finding that a defendant has been convicted of a crime under an invalid statute, might plausibly uphold a sentence of incarceration by withholding the "remedy" of total statutory nullification or, alternatively, by propounding from the bench a new and constitutionally permissible rule of criminal liability and applying that rule retroactively.<sup>110</sup>

The criticism here is the mirror image of the criticism (considered above) that the Adler Model runs afoul of the Personal Rights Thesis.<sup>111</sup> There, the point was that I granted some persons lacking personal rights the power to secure relief against invalid rules; here, the point is that I *fail* to grant some persons *holding* personal rights the power to secure relief against (their own treatment pursuant to) invalid rules.

My response to the criticism now under consideration is straightforward. As I have already argued, the Valid Rule Principle is neither true nor sufficiently deeply embedded, doctrinally, that it must be taken as true.<sup>112</sup> Thus the claimant who falls within an invalid rule, whose treatment is ultimately upheld pursuant to a judicial amendment to that rule, and who has no other constitutional complaint about that treatment — such as a "fair notice" complaint or an Eighth Amendment complaint — does not suffer any violation of his personal constitutional rights.<sup>113</sup>

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466, 472–80 (1988) (holding that a rule regulating direct mail solicitation by lawyers violated the commercial speech test for rule validity, and then separately considering whether claimant's own letter was "particularly overreaching," that is, whether the letter fell outside the properly invalidated portion of the rule); Candace Kovacic, *Remedying Underinclusive Statutes*, 33 WAYNE L. REV. 39, 40–43 (1986) (noting that nullification is sometimes chosen as a remedy for benefit-conferring rules). On this assumption, I then need to confront the objection stated in the text — namely, that the judicial action of amending an invalid rule, while upholding *P*'s own treatment as falling within the terms of the amended rule, runs afoul of the Valid Rule Principle.

<sup>110</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1328–29; *see id.* at 1325, 1335.

<sup>111</sup> *See supra* p. 1394.

<sup>112</sup> *See supra* pp. 1396–1401.

<sup>113</sup> A procedural and evidentiary problem arises here. Is not the court constitutionally constrained from concluding, peremptorily, that the claimant falls within the terms of its amendment to the invalid rule? Does not the claimant have a personal constitutional right to a sufficiently full factfinding process with respect to *that* issue? I will assume the answer is "yes." Even so, this fact hardly entails that the claimant's treatment pursuant to the invalid rule should be overturned outright. Instead — for example — the court could remand for a new trial on the question whether the claimant falls within the terms of its amendment to the invalid rule. *Cf. Osborne v. Ohio*, 495 U.S. 103, 125–26 (1990) (holding that a state statute, as narrowed by the state supreme court on appeal from claimant's conviction, was not overbroad, and remanding for a new trial to determine whether the claimant fell within the terms of the narrowing construction). Or, a jury might already have returned a special verdict making clear that the claimant is covered by the amendment, in which event there would surely be no procedural bar to a judicial decision upholding the claimant's treatment rather than overturning it or remanding the case for a new trial.



Perhaps Fallon would here object that even if my general arguments against the Valid Rule Principle are correct, the notion of a court promulgating a curative amendment to an invalid rule, and then applying that amendment retroactively to the claimant, is so counterintuitive and at odds with settled understandings of judicial review that any model allowing such a result should be rejected. But — given what the Supreme Court itself has said about the retroactive applicability of curative *interpretations* of rules — I do not think this feature of my model is really so esoteric:

[Claimant] contends that it was impermissible for the [state supreme court] to apply its construction of [the challenged statute] to him — *i.e.*, to rely on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed “may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t].”<sup>114</sup>

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See generally Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 5, at 244 (distinguishing between evidentiary considerations, and the “right to be judged by a constitutionally valid law,” that is, the Valid Rule Principle).

<sup>114</sup> *Osborne*, 495 U.S. at 115 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7 (1965) (citations omitted)). See generally *id.* at 115–22 (reviewing case law to support the proposition that a court can retroactively apply a valid narrowing construction of an invalid or potentially invalid rule, and sustain the treatment of a claimant who falls within the narrowing construction).

Indeed, in *Massachusetts v. Oakes*, 491 U.S. 576 (1989), four members of the Court agreed that a legislative amendment to an overbroad statute should vitiate a claimant’s overbreadth challenge to his sanction, which had been imposed pursuant to the statute and prior to the amendment. See *id.* at 584 (plurality opinion of O’Connor, J.). A Massachusetts statute proscribed the display of photographs of nude minors. Oakes was convicted pursuant to the statute, and raised both as-applied and overbreadth challenges. After the Supreme Court granted certiorari, the statute was amended to eliminate the overbreadth, and four members of the Court concurred that Oakes’s overbreadth challenge should be rejected and the case remanded to the state courts to determine “whether the former version of [the statute] can constitutionally be applied to Oakes.” *Id.* In effect, those four Justices thought that the legislative amendment to the invalid statute could be applied retroactively to Oakes, and that his conviction should be sustained if the state courts determined (perhaps by means of a new jury trial, see *supra* note 113) that his conduct fell within the terms of the amended and narrowed statute. As Justice O’Connor explained:

[T]he amendment of a statute pending appeal to eliminate overbreadth is not different, in terms of applying the new law to past conduct, from a state appellate court adopting a limiting construction of a statute to cure overbreadth. We have long held that in such situations the statute, as construed, “may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants.”

*Id.* (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7 (1965) (citations omitted)).

To be sure, the remaining five Justices in *Oakes* disagreed, believing that the postconviction legislative amendment to the Massachusetts statute should *not* remove Oakes’s overbreadth challenge. See *id.* at 585–88 (Scalia, J., concurring in the judgment in part and dissenting in part). My point in discussing *Oakes* is not to demonstrate that the Adler Model is fully supported by existing doctrine on facial and as-applied challenges; as I have already suggested, that doctrine is generally confused. See *supra* p. 1390. Rather, it is to rebut Fallon’s claim that the Adler Model — insofar as it directs the reviewing court to uphold a claimant’s treatment pursuant to an invalid rule, where the claimant is covered by the court’s amendment to that rule — is weird and esoteric. After all, four members of the Court in *Oakes* were willing to endorse a nearly identical practice.



I should also note that Fallon, in criticizing the Adler Model for running afoul of the Valid Rule Principle, seems to rely upon a version of that principle that his own model also violates. Let me distinguish between the strong and weak forms of the Valid Rule Principle:

- *The Valid Rule Principle (Strong Form)*: It violates *P*'s personal rights to be sanctioned or otherwise harmed by the application of an invalid rule to her.
- *The Valid Rule Principle (Weak Form)*: It violates *P*'s personal rights to be sanctioned or otherwise harmed by the application of a rule to her, where that rule has no valid severable subrule covering *P*.

The Fallon Model is inconsistent with the Valid Rule Principle (Strong Form). Fallon argues that courts should uphold *P*'s treatment pursuant to an invalid rule, as long as a valid severable subrule covering *P* can be identified. (Had Fallon structured his model so as to be compatible with the Strong Form of the Valid Rule Principle, he would not have been able to claim support from a decision like *Raines*, which is inconsistent with the Strong Form.<sup>115</sup>) Rather, the Fallon Model is only consistent with the Valid Rule Principle (Weak Form). But the Adler Model is also consistent with the Valid Rule Principle (Weak Form). Typically, if not invariably, when a court issues a curative amendment to an invalid rule and applies that amendment retroactively to claimant *P*, *P* will also fall within the scope of some valid severable subrule of the rule, and thus the Valid Rule Principle (Weak Form) will not be violated. (Typically, if not invariably, the cases in which courts are competent to promulgate curative amendments to invalid rules — rather than facially invalidating the rules — will be just the cases in which constitutional doctrine, severability principles, and indicia of legislative intent are sufficient to allow courts to divine valid severable subrules within invalid rules.<sup>116</sup>)

Fallon overlooks this point, and implicitly relies upon the Valid Rule Principle (Strong Form) in criticizing the Adler Model. To quote Fallon again: "[The Adler Model] implies that a court, upon finding that a defendant has been convicted of a crime under an invalid statute, might plausibly uphold a sentence of incarceration . . . ." <sup>117</sup> But

<sup>115</sup> *Raines* is inconsistent with the Strong Form, because the Strong Form would have required the Court in that case to sustain the claimant's constitutional challenge unless the statute in its enacted form (or some permissible reformulation thereof) was valid. But the Court in *Raines* did not hold that the challenged statute in its enacted form — prohibiting "any person" from interfering with voting rights — was valid, or even that some narrowing construction of the statute was valid. Rather, the Court held that the statute was valid insofar as it covered public officials. See *United States v. Raines*, 362 U.S. 17, 19–20, 24–25 (1960). Thus, as Fallon acknowledges: "[A] holding as to severability is necessary to reconcile *Raines* with . . . the 'valid rule requirement' . . . ." Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1331.

<sup>116</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 125–28.

<sup>117</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1328–29.

the Fallon Model has precisely the same implication, as it also violates the Strong Form of the principle. In any event, because I think both the Strong Form and the Weak Form of the Valid Rule Principle are incorrect, I do not think either variant should count in favor of the Fallon Model even if that model did better conform with the given variant than the Adler Model.

#### *D. The Ordinary Account of Statutory Interpretation*

Fallon argues that the Adler Model is inconsistent with the ordinary account of statutory interpretation:

Insofar as he resists the notion that constitutional challenges can be restricted to severable statutory subrules, Adler's position reflects too constricted a view of how language works and legal meaning emerges. His account is out of touch with ordinary notions of how courts construe statutes; sometimes, as in *Raines*, they reserve for later determination the question of what a rule or statute as fully specified would mean.<sup>118</sup>

Fallon's critique seems to be that the ordinary account of statutory interpretation permits the meaning of statutes to be refined ("specified") over time, and in particular to be shaped in light of constitutional values, and that the Adler Model by contrast requires courts to focus solely on the formal language contained in the canonical, enacted formulation of the rule. I suggest that this critique is misplaced, and that on closer examination it is the Fallon Model that is revealed to be profoundly inconsistent with the ordinary account of statutory interpretation.<sup>119</sup>

The Adler Model does *not* require the reviewing court to focus solely on the language of a rule's canonical formulation in deciding whether the rule is valid or invalid in light of rule-validity tests. Rather, the Adler Model recognizes that the scope of the rule will be refined over time, both to reflect the rule-enactor's purposes and to conform to constitutional values. The task of thus refining or "specifying" a rule falls (on the Adler Model) to the governmental bodies that have the primary legal authority to interpret it: state courts or agencies in the case of state statutes or regulations, and (arguably) federal agencies in the case of federal statutes or regulations.<sup>120</sup> The Adler Model

<sup>118</sup> *Id.* at 1335.

<sup>119</sup> By the "ordinary account of statutory interpretation," I mean commonly shared intuitions about statutory interpretation, as exemplified by (but not necessarily equivalent to) Supreme Court doctrine. I take it that Fallon intends the phrase "ordinary notions of how courts construe statutes" to carry a similar meaning.

<sup>120</sup> I say "arguably" because the extent to which federal agencies are indeed the authoritative interpreters of federal statutes remains uncertain and debatable. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court accorded agencies significant interpretive authority, by requiring courts to defer to a reasonable agency interpretation of a statute that the agency administers if the statute is unclear. *See id.* at 845. Yet it is un-



stipulates that: (1) the "rule" properly tested for invalidity by reviewing courts equals the canonical formulation of the rule, *as glossed by any authoritative interpretation issued by the body primarily responsible for interpreting it*; and relatedly (2) a rule, once invalidated, can be cured of its invalidity through a later-issued interpretation set forth by the primary interpretive body. This is what I said on the subject in *Rights Against Rules*:

[One] component of the remedial [part of the Adler Model] is *predicative*: a view about the appropriate judicial revision to the predicate of [invalid rule] *R*. The possibilities, here, are myriad but the two most salient alternatives are as follows. First, the court might *facially invalidate R* . . . . This could be a permanent nullification of *R*. More plausibly, though, the court's facial invalidation of *R* will leave open the possibility that the body responsible for issuing authoritative interpretations of *R* (be it an agency or a state supreme court) can cure *R*'s constitutional defects, and revive its legal authority, through a narrowing interpretation. Second, the court might *optimally revise R*. The court might promulgate what it takes to be the morally optimal revision to *R*, . . . subject again perhaps to subsequent re-revision by *R*'s authoritative interpreter.<sup>121</sup>

Perhaps I was not sufficiently explicit on the point. In any event, my intention in *Rights Against Rules* was to embrace the principles (contained in existing constitutional doctrine) that constitutional rule-validity tests apply to rules as authoritatively glossed,<sup>122</sup> and that invalidations do not preclude curative glosses.<sup>123</sup>

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certain both how far *Chevron* reaches, and how faithfully the Court is resolved to abide by the *Chevron* doctrine in deciding those cases to which the doctrine putatively applies. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 3.5-3.6, at 119-31 (3d ed. 1994 & Supp. 1999). Further, the Court has specifically held that courts should *not* defer to an agency's application of the avoidance norm — the norm that statutes should be construed to avoid constitutional difficulties. On that particular interpretive issue, federal agencies are not authoritative interpreters of federal statutes, at least under current doctrine. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988). So the notion that a federal court should override a federal agency's narrowing construction of a federal statute does seem less in tension with the ordinary account of statutory interpretation than the notion that a federal court should override a state court's narrowing construction of a state statute. See *infra* pp. 1408-09 (criticizing the Fallon Model as implying the latter result).

<sup>121</sup> Adler, *Rights Against Rules*, *supra* note 2, at 125 (footnotes omitted).

<sup>122</sup> The proposition that a federal court, adjudicating a constitutional challenge to a state statute, should test the statute for constitutionality *as it has been construed by the state courts* is so basic that it hardly needs citation. For one representative, recent restatement, see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) ("Normally this Court ought not to consider the constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." (citation omitted) (internal quotation marks omitted)).

<sup>123</sup> See, e.g., Fallon, *Making Sense of Overbreadth*, *supra* note 77, at 877 ("Suppose . . . that the Supreme Court holds a state criminal statute unconstitutionally overbroad, but that the state, through a series of declaratory judgment actions, obtains a satisfactory narrowing construction. Clearly the state can prosecute violations occurring after the narrowing construction was obtained.") (citing cases).



The Adler Model, with these features, is reasonably consistent with the ordinary account of statutory interpretation, both in permitting the dynamic refinement or "specification" of rules, and in recognizing that federal constitutional courts are authoritative with respect to questions of constitutional validity but not necessarily with respect to the questions of statutory or regulatory interpretation that may arise in a constitutional case.

By contrast, the Fallon Model is in serious tension with the ordinary account. Imagine that a statute *R* has been enacted by a state legislature and that the state supreme court has issued an authoritative interpretation of the rule. Imagine, further, that the statute as thus authoritatively glossed is still invalid in light of some constitutional rule-validity test. Fallon would nonetheless seemingly urge a federal reviewing court to reject claimant *P*'s challenge to the rule, as long as the court can identify some valid severable subrule of *R* that covers *P*. In effect, this gives the federal court the authority to formulate a curative interpretation of *R* even though *R* is a state law, and even though the federal court's interpretation conflicts with that issued by the authoritative state body responsible for interpreting *R*. Why not instead review the rule as interpreted by the state supreme court,<sup>124</sup> or at most use a procedural device such as abstention or certification to direct the interpretive question to that body?<sup>125</sup> Conversely, in a case in which no authoritative gloss on *R* exists or is available, it is troubling (under what I take to be the ordinary account of statutory interpretation in a federal system) that a federal court should assume the task of refining or "specifying" a state statute rather than focusing on the validity of the statute as enacted.<sup>126</sup> An analogous point can be made

<sup>124</sup> See *City of Chicago v. Morales*, 119 S. Ct. 1849, 1861 (1999) ("We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. 'The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.'" (quoting *Smiley v. Kansas*, 196 U.S. 447, 455 (1905))).

<sup>125</sup> See, e.g., *Arizonans for Official English*, 520 U.S. at 75-80 (discussing certification and other techniques for securing state court interpretations of state statutes).

<sup>126</sup> I will concede that, in such a context, a federal court could comfortably perform some basic refinement or "specification" of the enacted text of a challenged state statute by first predicting how the state courts would construe the text and then evaluating the constitutionality of the statute, thus refined. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts . . . ." (citing *Dombrowski v. Pfister*, 380 U.S. 601, 612-15 (1973))). But the Fallon Model, as I understand it, would direct a federal court to take much more aggressive steps in "refining" a state statute that has not yet been interpreted by the state courts. Specifically, it would seemingly direct the federal court to reject a constitutional challenge to such a state statute *R*, as long as some severable portion *S* of some permissible reformulation of *R* is constitutionally valid, even if *S* itself is not a permissible reformulation of *R* — that is, even if the state courts cannot be predicted to construe *R* as meaning *S*. See *supra* pp. 1380-81 (explaining that the Fal-



where *R* is a federal statute, if some federal agency rather than the federal courts serves as the authoritative interpreter of the statute.<sup>127</sup>

More profoundly, the Fallon Model is inconsistent with the ordinary account of statutory interpretation because that model (in effect) conceptualizes a rule as a set of entities, rather than a single entity. It is one thing to say that a rule is a single, dynamic entity that changes over time, as opposed to a single, static entity. This is intuitively plausible, and (as I have just explained) the Adler Model is consistent with this dynamic understanding of rules. But the Fallon Model does not conceptualize a rule as a single, dynamic entity. Rather, Fallon sees the text of the rule as mapping onto a set (perhaps a large set) of subrules that are distinct from each other in their language and scope, but nonetheless *coexist* over time (at least for purposes of constitutional review). The following scenario is a straightforward upshot of the Fallon Model:

*The Garden of Forking Paths: Rules and Their Multiple Subrules:*

- Time 1: *P*<sub>1</sub> is sanctioned pursuant to rule *R*, and challenges her sanction in a particular federal court (a district court, an appellate court, or the Supreme Court). The court determines that there is some valid severable subrule *S*<sub>1</sub> of *R* that covers *P*<sub>1</sub>, and rejects *P*<sub>1</sub>'s challenge.
- Time 2: *P*<sub>2</sub> is sanctioned pursuant to rule *R*, and challenges her sanction in the same federal court. *P*<sub>2</sub> does not fall within the scope of *S*<sub>1</sub>. However, the court determines that there is some valid severable subrule *S*<sub>2</sub> of *R* that covers *P*<sub>2</sub>, and rejects *P*<sub>2</sub>'s challenge.
- Time 3: *P*<sub>3</sub> is sanctioned pursuant to rule *R*, and challenges her sanction in the same federal court. *P*<sub>3</sub> does not fall within the scope of *S*<sub>1</sub> or *S*<sub>2</sub>. However, the court determines that there is some valid severable subrule *S*<sub>3</sub> of *R* that covers *P*<sub>3</sub>, and rejects *P*<sub>3</sub>'s challenge.

This scenario is odd and deeply troubling, at least given ordinary understandings of what a statute or rule consists in. Rule *R* is mapped onto multiple, distinct variants, and the court's choice of one variant (*S*<sub>1</sub>) at a particular time does not preclude the court from picking another variant (*S*<sub>2</sub>) at a later time. Note that the court would *not* be constrained by precedent from first picking *S*<sub>1</sub> and then later picking *S*<sub>2</sub>, or later *S*<sub>2</sub> and then *S*<sub>3</sub>. Precedent would constrain the court from changing its view concerning the *set* of subrules onto which *R* is mapped. That is, if the court at Time 1 held that *R* maps onto the set of subrules (*S*<sub>1</sub>, *S*<sub>2</sub>, *S*<sub>3</sub>), it could not later hold that *R* maps onto a different set of subrules (*S*<sub>1</sub>, *S*<sub>2</sub>, *S*<sub>4</sub>). But — given Fallon's focus on

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lon Model focuses on subrules, not merely on the permissible reformulations or narrowing constructions of invalid rules).

<sup>127</sup> See *supra* note 120 (describing current doctrines, in part unclear, concerning the extent to which federal courts should defer to federal agencies on questions of statutory interpretation).



subrules rather than rules — nothing in the doctrine of precedent should constrain a court from holding that claimant *P*<sub>1</sub> loses because she is covered by a severable subrule of *R*, and then later holding that claimant *P*<sub>2</sub> loses because she is covered by a different severable subrule of *R*. Again, the Fallon Model stipulates that a given claimant *P* loses as long as there is *some* valid severable subrule of the challenged rule *R* that covers *P*.<sup>128</sup>

Fallon might respond that I have misconstrued his model. Once a court picks *S*<sub>1</sub> as a valid severable subrule of *R*, then that court and others covered by its precedents are obliged to equate *R* with *S*<sub>1</sub> — to sustain constitutional challenges by all persons falling within the scope of *R* but outside the scope of *S*<sub>1</sub>.<sup>129</sup> If this is Fallon's view, then his talk of "subrules" is quite misleading. (The view could be more straightforwardly framed as follows: (1) no one may be sanctioned under an invalid *rule*; and (2) in evaluating the validity of a given rule, the court should focus on the text of the rule, as refined by the court in light of legislative purposes and constitutional values.) Alternatively, if Fallon agrees that I have correctly construed his model, that a given rule *R* does map onto a set of multiple and distinct subrules, which co-exist over time (at least for purposes of constitutional review), then the

<sup>128</sup> Perhaps an example would help illustrate my point here. (The example is loosely based upon the *Raines* case, which Fallon employs to explain the Fallon Model and its element of subrule severability.) Imagine that Congress passes a statute *R* prohibiting "any person" from interfering with voting rights. Mr. Jones is a public official who is prosecuted and convicted pursuant to the statute, and he challenges *R* as invalid. The Supreme Court under the Fallon Model upholds Jones's conviction, citing the following subrule *S*<sub>1</sub>, which is *one* severable and valid subrule of *R*: "Any person who is a public official" shall not interfere with voting rights. Subsequent to the Supreme Court decision in Jones's case, Mr. Smith (a private person with a large staff of servants, whom he effectively keeps in a condition of involuntary servitude) prevents his servants from exercising their voting rights. Smith is prosecuted and convicted pursuant to *R*. According to the Fallon Model, as I understand it, the Court should *uphold* Smith's conviction — even though he is not a public official, and therefore falls outside the scope of *S*<sub>1</sub> — as long as the following subrule *S*<sub>2</sub> is *another* severable and valid subrule of *R*: "Any person who creates a condition of involuntary servitude" shall not thereby interfere with voting rights.

I find this to be a counterintuitive result. The Court replaces *R* with *S*<sub>1</sub>, for the purpose of evaluating Jones's rule-validity challenge. Yet *S*<sub>1</sub> is not a real replacement for *R* (even for bodies, such as the Court itself, that are governed by the Court's precedents). Smith can still be prosecuted, pursuant to *R*, despite falling outside the scope of *S*<sub>1</sub> — if *S*<sub>1</sub> is really just one variant of *R*, rather than a full-fledged replacement, I don't see why Smith should have a successful "fair notice" challenge to that prosecution — and Smith's constitutional challenge to *R* will be evaluated by replacing *R* with a different variant, namely *S*<sub>2</sub>.

By contrast, the Adler Model would handle the example as follows: The Supreme Court would adjudicate Jones's rule-validity challenge by evaluating the validity of *R* itself (as glossed by its authoritative interpreter, which might be a federal agency or might be the Court). If the challenge succeeds, either *R* would be facially invalidated or it would be partially invalidated, perhaps replaced with *S*<sub>1</sub>. In that latter case, Jones's own sanction would be upheld, and *S*<sub>1</sub> (announced by the Court) would serve as the single, canonical version of *R* until further amended by Congress or a relevant federal agency. Absent such amendment, Smith could not be prosecuted.

<sup>129</sup> See *supra* note 44 (discussing ambiguity in Fallon's definition of a "subrule").



Fallon Model is truly esoteric. The model might still be normatively attractive — it might still be best justified in light of constitutional norms — but Fallon could hardly claim to be tracking ordinary intuitions about rules and their interpretation.

### E. The Scope of Judicial Remedies

The Adler Model might be criticized for adopting an implausibly strong view of the scope of judicial remedies. Under the model, a court's judgment invalidating a rule obliges police, prosecutors, and all other government officials not to enforce the rule against anyone subject to the rule (or anyone falling within the invalidated portion of the rule, in the case of a partial invalidation). This feature of the model is seemingly inconsistent both with the limited reach of claim and issue preclusion doctrines, and with the fact that such doctrines may technically bind only courts, not government officials generally.<sup>130</sup>

I attempted to answer this objection in *Rights Against Rules*. Does Fallon take my answer to be insufficient? I am not sure; in any event, he does not identify any specific flaws in the answer,<sup>131</sup> or even raise the remedial objection explicitly.<sup>132</sup> Thus I will simply refer the reader

<sup>130</sup> See Adler, *Rights Against Rules*, *supra* note 2, at 132–52 (articulating and rebutting institutional objections to the Adler Model).

<sup>131</sup> To be sure, the Fallon Model has a different and narrower view of the scope of federal remedies than the Adler Model, see Fallon, *As-Applied and Facial Challenges*, *supra* note 1, 1339–40; *supra* pp. 1383–85, but Fallon does not argue that the remedial component of the Adler Model violates Article III, or is otherwise outlandish.

<sup>132</sup> In a footnote added in clarification of his views, Fallon does state that *Rights Against Rules* was too bold in its description of overbreadth doctrine:

Professor Adler begins by arguing that the “skeptical conclusion” that the force of rulings of facial invalidity resides wholly in doctrines of claim and issue preclusion and of precedent “must, somehow, be wrong,” because it is inconsistent with what he terms “the official doctrine” that findings of statutory overbreadth wholly preclude further enforcement of the challenged statute against anyone. [Citation to *Rights Against Rules*, *supra* note 2, at 149.] In characterizing this as “the official doctrine,” Adler cites dictum in *Broadrick v. Oklahoma*, 413 U.S. 601, 611–13 (1973), but does not discuss Supreme Court cases that cannot be reconciled with his claim, such as [*Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)].

Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1340 n.108. Fair enough. The Supreme Court's overbreadth case law is not fully consistent. The statement in *Broadrick* is not “official doctrine” in the sense of being uncontradicted by any other statement in the overbreadth case law. A statement in *Doran*, itself arguably dictum, does indeed contradict the *Broadrick* statement. Rather, as I explained in *Rights Against Rules*, the *Broadrick* statement is “official doctrine” in the sense that this statement — in contrast with the view that an overbreadth judgment only protects the litigant who has secured it — better coheres with most of the Court's statements about the function of the overbreadth doctrine, namely that it prevents overbroad laws from “chilling” the protected speech of persons who are covered by those laws, who are not yet party to judicial proceedings, and who might refrain from speaking rather than incur the expense of a lawsuit. See Adler, *Rights Against Rules*, *supra* note 2, at 141–45.

In any event, my basic claim is not that the remedial component of the Adler Model is better supported by Supreme Court doctrine than the remedial component of the Fallon Model. Cf.

to my analysis in *Rights Against Rules*. In very brief summary: (1) an order invalidating a statute that is issued against enforcement officials by a lower federal court in a class action case can, clearly, oblige them not to enforce the statute against anyone;<sup>133</sup> (2) a Supreme Court holding in a nonclass case can similarly thus oblige enforcement officials, given *Cooper v. Aaron*;<sup>134</sup> and (3) the Court has said in the "overbreadth" context that "[t]he consequence of [an overbreadth holding] is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression,"<sup>135</sup> which presumes that lower federal court judgments that are not issued in class action cases can nonetheless protect nonparties from enforcement of the invalid rule.<sup>136</sup>

#### IV. CHOOSING BETWEEN THE MODELS

The considerations I analyzed in Part III exhaust Fallon's case, as I understand it, against the Adler Model. I have tried to show that none of those considerations undermines the Adler Model. If I am correct, then Fallon's case against the Adler Model is a failure.

Does this conclusion mean that the Adler Model is better, constitutionally speaking, than the Fallon Model? Not at all. The Fallon Model and the Adler Model are two different legal structures. The Fallon Model confers upon each person sanctioned or otherwise harmed under an invalid rule the legal power to secure a judicial invalidation of his own treatment. The Adler Model confers upon each person who would benefit from the repeal or amendment of an invalid rule the legal power to secure a judicial repeal or amendment of that rule. In *Rights Against Rules*, and again in *Personal Rights and Rule-Dependence*, I labored hard to show that models like Fallon's do not vindicate the personal rights of constitutional claimants.<sup>137</sup> It is not the case that everyone upon whom the Fallon Model confers the power to secure judicial relief — everyone sanctioned or otherwise harmed by

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*supra* pp. 1390-91 (arguing that doctrines concerning facial and as-applied challenges should not be used to adjudicate between the two models). Rather, it is that this component: (1) is consistent with Article III of the Constitution, *see* Adler, *Rights Against Rules*, *supra* note 2, at 133-45; (2) is technically feasible, *see id.* at 145-52; and thus (3) should be implemented if the Adler Model is better than the Fallon Model and other alternatives, in light of constitutional norms, *see infra* pp. 1413-16. My characterization of the *Broadrick* statement as "official doctrine" was meant to bolster the first assertion — that the Adler Model is consistent with Article III. As I have already noted, Fallon does not appear to challenge that assertion.

<sup>133</sup> *See* Adler, *Rights Against Rules*, *supra* note 2, at 145-47.

<sup>134</sup> 358 U.S. 1 (1958); *see* Adler, *Rights Against Rules*, *supra* note 2, at 147-48.

<sup>135</sup> *Broadrick*, 413 U.S. at 613.

<sup>136</sup> *See* Adler, *Rights Against Rules*, *supra* note 2, at 148-52.

<sup>137</sup> *See supra* pp. 1395 (discussing the position taken in these articles).



the application of an invalid rule — has suffered a violation of her own, personal, constitutional rights. But one should not leap from this premise to the conclusion that the Fallon Model is worse, constitutionally speaking, than the Adler Model. That remains an open question.

Think of the point this way. Let us sever from the Fallon Model its purported function, namely, vindicating the putative (but, in my view, spurious) personal rights of those to whom invalid rules are applied. We are then left with a particular assignment of legal powers, rights, duties, etc., to various private persons, to judges, and to other government officials, just as the Adler Model constitutes a particular (and different) assignment of legal rights, powers, duties, etc., to private persons, judges, and other government officials. Which legal structure is better justified, in light of constitutional norms? *That* is the question that neither Fallon, nor I, has yet considered. More generally, neither Fallon, nor I, nor those other scholars who have recognized the rule-dependent cast of constitutional doctrine and proposed rule-dependent models of constitutional adjudication, has yet considered which of the multiple possible rule-dependent structures (the Dorf Model, the Isserles Model, the Fallon Model, the Adler Model, the Monaghan Model, and maybe others)<sup>138</sup> is best in light of constitutional norms. However, since this Response addresses Fallon's work, I will focus here on the binary comparison between the Adler Model and the Fallon Model.<sup>139</sup>

What does it mean for a given adjudicatory structure to be better in light of constitutional norms? I will offer a very quick and preliminary account in a moment. The reader may dislike this account; her own might be quite different. No matter. As long as the reader takes the general concept here deployed to be a coherent one — as long as she thinks it sensible to say that a given adjudicatory structure better implements the norm of equal protection, or free speech, or due process, or all of the norms taken together — then she should agree that justifiability-in-light-of-constitutional-norms can be used as a basis for

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<sup>138</sup> See *supra* note 94 (citing articles by Monaghan, Dorf, and Isserles, presenting their models of rule-dependent adjudication).

<sup>139</sup> I must rescind my statement in *Rights Against Rules* that "to attempt a rescue of Monaghan's [defense of the Valid Rule Principle] by saying that a litigant has the *legal*, if not [personal] right to be judged in accordance with a constitutionally valid rule of law is a confusion." Adler, *Rights Against Rules*, *supra* note 2, at 160. This statement is incorrect. A claimant should indeed have a legal right, although not a personal right, to overturn his sanction pursuant to an invalid rule if the Fallon Model, the Monaghan Model, or some other model like these is best justified, in light of constitutional norms, as compared to the Adler Model and other models that fail to recognize such a legal right. The fact that models such as Monaghan's and Fallon's could be understood as conferring legal (not personal) rights against individual treatments pursuant to invalid rules, and could be best justified in light of constitutional norms, was not clear to me when I wrote *Rights Against Rules*.



adjudicating between the Adler Model and the Fallon Model.<sup>140</sup> By "constitutional norms," I mean, roughly, the norms set out in the Bill of Rights (the norms whose rule-dependent doctrines are the focus of *Rights Against Rules* and, to a considerable extent, of Fallon's Commentary).<sup>141</sup> I do not mean to claim that comparisons of adjudicatory structures always reduce to comparisons in light of constitutional norms. One might ask, instead, whether a particular structure is consistent with Article III of the Constitution,<sup>142</sup> or more generally with the principles governing courts and legislatures in our constitutional system (for example, the Personal Rights Thesis or the appropriate principles of statutory interpretation).<sup>143</sup> In general, the norms set forth in the Bill of Rights are relevant factors, but may not be decisive factors, for deciding how constitutional doctrines governing adjudication under the Bill of Rights should be structured. The norms (necessarily) become decisive only when other factors are unhelpful — as is the case, I have tried to argue, with the choice between Fallon's model and my own.<sup>144</sup>

So again: What does it mean for a given adjudicatory structure to be better in light of constitutional norms? Here is a very rough sketch. Moral norms, paradigmatically, enable comparisons of actions. Insofar as they have a "consequentialist" component, moral norms also enable comparisons of outcomes or world-states.<sup>145</sup> Constitutional norms may

<sup>140</sup> Lawrence Sager has famously argued that substantive constitutional doctrines, which guide the activities of reviewing courts, often are not coterminous with constitutional norms but may be narrower than those norms, once "institutional" considerations (the features of courts) are taken into account. See Sager, *supra* note 32, at 1213–28. In effect, Sager claims that substantive judicial doctrines should be evaluated in light of underlying norms, and that institutional considerations are relevant to the evaluation. My claim is related, but more general: first, *all* the doctrines that structure judicial review (substantive doctrines, remedial doctrines, standing doctrines, doctrines concerning jurisdiction or the existence of a cause of action, doctrines concerning the availability of "facial" or "as-applied" challenges) should be evaluated in light of underlying norms (assuming no other relevant criteria for evaluation); and second, institutional considerations, plus any other facts about the world, are potentially relevant to this evaluation.

<sup>141</sup> See *supra* note 26 (discussing whether rule-dependence is true of constitutional doctrine outside the Bill of Rights).

<sup>142</sup> See, e.g., Adler, *Rights Against Rules*, *supra* note 2, at 133–45 (considering whether the Adler Model is consistent with Article III).

<sup>143</sup> See, e.g., Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1335 (arguing that the Adler Model is inconsistent with "ordinary notions of how courts construe statutes" and with the valid rule requirement).

<sup>144</sup> See *supra* Part III, pp. 1386–1412.

<sup>145</sup> See, e.g., SHELLY KAGAN, *NORMATIVE ETHICS* 25–189 (1998) (discussing the act-guiding character of moral norms and the distinction between consequentialist and deontological moral factors). By the "outcome" of an action, I mean the complete set of consequences that would result were the action performed — both logical consequences (the occurrence of the action itself), and causal consequences. See RICHARD A. FUMERTON, *REASON AND MORALITY: A DEFENSE OF THE EGOCENTRIC PERSPECTIVE* 54 (1990). By the "better" or "worse" outcome or world-state, I here mean the outcome that is better in light of consequentialist norms (or the con-



not always be moral norms,<sup>146</sup> but constitutional norms can do everything that moral norms can do.<sup>147</sup> Actions can be assessed as better or worse in light of constitutional norms and, typically, so can world-states.

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sequentialist component of norms). A consequentialist norm is not necessarily a *utilitarian* norm. The utilitarian norm evaluates outcomes in light of the total well-being they contain. Consequentialist norms need not do that. See KAGAN, *supra*, at 62 (distinguishing between utilitarianism and consequentialism); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* 1-40 (rev. ed. 1994) (same). Rather, consequentialist norms are those that state *shared* or *impersonal* criteria for evaluation; a consequentialist norm marks out some kind of change in outcome, such that this change is better or worse for all persons (or all persons within a specified group, in which case the norm is "consequentialist" relative to that group). See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 152-53, 164-66 (1986) (distinguishing between "agent-neutral" and "agent-relative" considerations).

To be a bit more precise, I would offer the following definition of a "consequentialist" norm: a norm that (1) ranks outcomes, or at least some outcomes, as better or worse; (2) is shared by all persons in the specified group, in the sense that the norm is one consideration that determines the actions that he or she should perform; and (3) is shared by all persons in the specified group, in the different sense that the same outcomes are ranked the same way by each person, as he or she applies the norm. (The last element is needed to rule out norms that have an indexical component, such as a norm that evaluates outcomes in light of "my well-being" or "my receiving a fair share of the social pie," and, more generally, norms that produce different results depending on the "context" or point of view of the person applying the norm.)

Some might add further elements to this definition of a "consequentialist" norm, see, e.g., Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1604 (1998) (defining a "value" as a criterion that is "complete" in the sense that it ranks all options as better, worse, or equal), but I would not do so, see Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1401-08 (1998) (acknowledging that outcomes may be "incomparable," that is, neither better, nor worse, nor equal, and citing sources).

<sup>146</sup> See *supra* p. 1376 (noting scholarly dispute on this issue); see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (describing different sources of constitutional interpretation, including but not limited to "value arguments that assert claims about justice or social policy").

<sup>147</sup> The thesis that constitutional norms (even if nonmoral) still enable comparisons of actions should not be troubling, given the "state action" doctrine. The predicate for a constitutional challenge under the Bill of Rights is almost always some governmental action — under the Adler Model, an action of rule-enactment — and constitutional adjudication focuses centrally on whether that action is justified in light of constitutional norms or of tests implementing those norms. See, e.g., *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989) (denying relief based upon the state action component of the Fourteenth Amendment Due Process Clause). The thesis that a constitutional norm (even if nonmoral) contains or typically contains a consequentialist component that enables comparisons of *outcomes* may be more surprising, but — given the relatively minimal conception I have offered of a "consequentialist" norm, see *supra* note 145 — this should seem at least a plausible thesis. Free speech, equality, privacy and the like are commonly referred to as constitutional "values," see, e.g., Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1352, where in turn values just are normative criteria that inter alia enable comparisons of outcomes, see, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. (forthcoming May 2000) (manuscript at 89-91, on file with the Harvard Law School Library). Further, constitutional values are plausibly shared in the relevant sense: they are values for all members of the constitutional community, and whether an outcome is better or worse in light of a given constitutional value should not depend upon the identity of the person performing the evaluation.



Whether the Adler Model or the Fallon Model is better in light of constitutional norms reduces to this: Which action by the Supreme Court, namely the action of promulgating the Adler Model or the action of promulgating the Fallon Model, would be better in light of constitutional norms? The better action is not necessarily the action that leads to the better outcome. To use a hoary example from moral theory: if I have the choice of killing one person or performing an action which is not a killing, and if my action of killing would (somehow) prevent five killings in the future, then the better outcome is the outcome in which I perform the killing, but that action may not be better than the alternative of not killing.<sup>148</sup> Analogously, the doctrinal utterances that constitutional norms require the Supreme Court to perform need not be the utterances that produce the constitutionally best world-state. But I find it very odd to think that the Court would ever find itself constitutionally compelled to produce a constitutionally sub-optimal world-state, and thus (at least tentatively) my view is that the Court ought to promulgate that adjudicatory structure the outcomes of which are best in light of constitutional norms.

Which structure is that? The Adler Model, if given legal effect by the Court, would lead to one outcome or world-state (call it  $O_a$ ); the Fallon Model would lead to another (call it  $O_f$ ). Is  $O_f$  or  $O_a$  better in light of constitutional norms?

This question may seem impossibly difficult. Different rules might be enacted in  $O_f$  than in  $O_a$ . The content of doctrinal rule-validity tests might be different; for that matter, so might the very content of the Bill of Rights. A different group of persons, perhaps with a materially different set of intellectual and other abilities bearing upon the adjudicatory task, might occupy judicial office in  $O_f$  and  $O_a$ .<sup>149</sup> However, these possibilities all strike me as highly speculative. We can, I think, produce a reasonably reliable assessment of the comparative constitutional status of  $O_f$  and  $O_a$  by ignoring background differences in the Bill of Rights, in constitutional rule-validity doctrines, in the set of enacted statutes and other rules, and in the identity of judges and legislators, and instead focusing on the structural differences between the Fallon Model and the Adler Model — most importantly, on the divergent approaches that the models direct courts to take in remedying invalid rules.

The Adler Model employs a *wholesale* approach to the rectification of invalid rules. Given an invalid rule  $R$  and a successful constitutional challenge to that rule, the Adler Model directs the reviewing

<sup>148</sup> See KAGAN, *supra* note 145, at 70–105; NAGEL, *supra* note 145, at 175–85.

<sup>149</sup> Cf. KAGAN, *supra* note 145, at 64 (noting the difficulty in predicting the overall consequences of a given action).



court to change the operative language of the rule — to issue an order that (at least if a sufficient number of other courts issue similar orders) will function the same way as a legislative repeal or amendment of *R* (except in leaving latitude for further changes to *R* not only by the legislature but also by its authoritative interpreters, for example, state courts or federal agencies), and will be taken by citizens and enforcement officials as altering the canonical language of the rule. By contrast, the Fallon Model employs a *piecemeal* approach to the rectification of invalid rules. Courts uphold or overturn the treatment of particular litigants pursuant to the rule *R* — depending on whether the litigants fall within a valid severable subrule of *R* — without making any change to *R*'s operative language. A given judicial holding, invalidating a particular claimant *P*'s treatment pursuant to *R*, may dissuade enforcement officials from applying the rule in what they take to be similar cases; but the Fallon Model stipulates that those officials are under no legal obligation to refrain from enforcing *R* against persons other than *P*, and that no change in the operative language of the rule has occurred.<sup>150</sup>

Which approach is better, in light of constitutional norms? Given the expected profile of norms, tests, invalid rules, judges, and legislators, is the better outcome one in which reviewing courts perform wholesale changes to the operative language of invalid rules, or rather one in which they grant case-by-case exceptions from invalid rules without amending the rules' operative language? In answering this question, the following concepts may be of some use. For a given rule *R*, the *optimal correction* *R'* to *R* is the following: that change in the canonical language of *R*, plus that pattern of deviations from the changed language, that is best in light of constitutional norms. (Note that the best outcome may not be one in which *R*'s language is changed and that language is then generally followed; whether general compliance with rules is morally or constitutionally optimal is an open and much-debated question.<sup>151</sup> If general compliance is constitutionally optimal, then the optimal correction *R'* will involve some change in *R*'s language and no deviation from the new language; if not, then no mere change in *R*'s language will secure an optimal outcome unless

<sup>150</sup> More precisely, as I have already discussed, the Fallon Model does not impose such an obligation upon legal officials, but also does not preclude the imposition of such an obligation by doctrines extrinsic to the model. See *supra* 1383–84 (discussing the Fallon Model's conception of judicial remedies). For simplicity, in sketching here how the Fallon Model and the Adler Model should be compared in light of constitutional norms, I will assume that no such extrinsic doctrines are in force.

<sup>151</sup> See, e.g., LARRY ALEXANDER & EMILY SHERWIN, *PAST IMPERFECT: RULES, PRINCIPLES, AND DILEMMAS OF LAW* (forthcoming 2001); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991).



there are some deviations from that amended language.) Similarly, for a given set  $S$  of invalid rules, the optimal correction  $S'$  is the following: that change in the canonical language of each rule belonging to  $S$ , plus that pattern of deviations from the changed language of each rule, which is best in light of constitutional norms.<sup>152</sup> The Adler Model and Fallon Model should be evaluated by asking the following: Given the actual set  $S^*$  of invalid rules that legislators and other rule-promulgators can be expected to enact, will wholesale revision of  $S^*$  (as per the Adler Model) or piecemeal revision of  $S^*$  (as per the Fallon Model) produce an outcome closer to the optimal correction  $S^{*'} of that set of rules?$

I do not know the answer to this question. I do not even have a good guess. The Fallon Model could move  $S^*$  closer to  $S^{*'}$ , as compared to the Adler Model, for two basic reasons. First, Adlerian judges might frequently "overcompensate" for the flaws in the operative language of invalid rules. They might facially invalidate rules whose optimal corrections<sup>153</sup> really involve only small changes in their operative language; or they might issue partial-invalidating orders that amend the operative language of invalid rules in significantly suboptimal ways. Second, Adlerian judges are limited in the remedial resources available to them. Even if Adlerian judges generally perform (or induce legislatures or authoritative interpreters to perform) optimal changes to the operative language of invalid rules,  $S^{*'}$  may involve a significant level of deviation from its rules, that is, from the optimal linguistic reformulation of the rules belonging to  $S^*$ . That is an outcome that Adlerian judges have no legal power to secure, because the only remedy available to them is a wholesale change in the operative language of an invalid rule.

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<sup>152</sup> Note that the change to a particular invalid rule  $R$ , worked by  $S'$ , is not necessarily the same as the optimal correction of  $R$  standing alone.  $R$ 's optimal correction, standing alone, assumes that other invalid rules (those in  $S$ ) will remain in effect without judicially mandated changes in their operative language or enforcement; but if those rules are judicially changed (as they may well need to be, since they are invalid), then the optimal correction of  $R$  standing alone may no longer be best in light of constitutional norms. This is why we need to talk about the optimal correction of the set of invalid rules. For the remainder of this Response, when I refer to the optimal correction of a particular rule  $R$ , I mean the optimal correction that occurs as part of  $S'$  rather than its optimal correction standing alone.

Lest the reader be confused, I should state that "optimal correction" as defined here is *not* equivalent to the concept of "optimal revision" that I discussed in *Rights Against Rules*, in the course of explicating remedial variants of the Adler Model. See Adler, *Rights Against Rules*, *supra* note 2, at 125. The "optimal revision" to an invalid rule is the optimal change in the canonical language of the rule; the "optimal correction" is that change in the canonical language of the rule, *plus* that pattern of deviations from the changed language, that is optimal.

<sup>153</sup> See *supra* note 152 (clarifying that "optimal correction," here, means the revision to the invalid rule that occurs as part of  $S^{*'}$ ).



On the other hand, it could well be the Adler Model, not the Fallon Model, that moves  $S^*$  closer to  $S^{*'}.$  First, Fallonian judges are also limited in their remedial resources. Assume that the optimal correction of many rules in  $S^*$  involves a significant change in their operative language. A Fallonian judge cannot change the operative language of an invalid rule; at best, she can follow a practice of sustaining every constitutional claimant's challenge to his treatment pursuant to the rule if the claimant's treatment would not be warranted by the rule's optimal correction, and hope that enforcement officials will be dissuaded from applying the rule to "similar" nonclaimants (and will understand from the judicial opinion which nonclaimants are relevantly similar). Second, the particular approach that the Fallon Model directs judges to take — namely, asking whether the claimant's treatment falls under a valid severable subrule of an invalid rule — seems ill-designed to secure anything close to an optimal move from  $S^*$  to  $S^{*'}.$  Why not ask, instead, whether the claimant  $P$  falls within the optimal correction of the challenged rule? The two questions are quite different:  $P$ 's sanction can be licensed by some valid severable subrule of  $R$  without falling within its optimal correction, and vice versa.<sup>154</sup>

<sup>154</sup> A simple example should make the point that a sanction can fall within a valid severable subrule of an invalid rule  $R$ , without falling within its optimal correction. Imagine that a rule  $R$  prohibits "any abortion." A valid severable subrule (assuming there is no "overbreadth" doctrine for abortion rights, cf. Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1356 (noting judicial and scholarly debate on this issue)) might be a rule prohibiting "any abortion that is performed after the  $X$ th week, except in a hospital." This subrule is valid, let us assume, because considerations of maternal health are generally strong enough to require that abortions after the  $X$ th week be performed in a hospital. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."). Doctor  $P$  performs an abortion after the  $X$ th week, outside a hospital, and is sanctioned pursuant to  $R$ . In that case,  $P$  does fall within a valid severable subrule of  $R$ , but it is an open question whether he falls within the optimal correction of  $R$ . In his particular case, the risk to maternal health may have been low enough, and the nonhospital facilities safe enough, that his own act of abortion merits an exception from  $R$  and from any amendment thereof.

More generally, this kind of case can be readily constructed whenever there is an action such that (1) it is better, in light of constitutional norms, for the actor to be free to perform that action, but (2) the action falls within the scope of some constitutionally valid rule, given the inevitable overinclusiveness of even valid rules.

As for the reciprocal case, imagine a rule  $R$  that prohibits the utterance of "offensive or indecent language in favor of African-Americans." Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (striking down a law prohibiting hate speech under the First Amendment, as content- and viewpoint-discriminatory).  $R$  may well have no valid severable subrule (because it has an inseparability clause; or because, as Fallon suggests, an impermissible motive generally permeates all subrules of racially motivated rules, see Fallon, *As-Applied and Facial Challenges*, *supra* note 1, at 1345; or because there is no way to extricate a subrule of this rule that functions as a free-standing prohibition and omits any reference to race). So  $P$ 's action in violation of  $R$  may well not fall within any valid severable subrule thereof; but it could still be a sufficiently assaultive

Perhaps Fallon's focus on subrule severability, rather than optimal correction, is warranted by the epistemic deficits of judges, or by the capabilities or deficits of legislators and enforcement officials. But that is far from clear.

Again, I do not know whether the Adler Model or the Fallon Model would move  $S^*$  closer to  $S^{*'}.$  Nor is it necessarily true that the comparison of  $O_1$  and  $O_2$  reduces to the "optimal correction" analysis I have just laid out; that will be true only if the same rules, norms, tests, and so forth, obtain in the two worlds, and the outcomes could in theory significantly diverge with respect to these features. Comparing these outcomes is clearly a difficult task. But it is not, I believe, a task we can avoid. Here, as in many other areas of constitutional law, legal scholars (and the Supreme Court) must undertake an empirical and instrumental assessment of proposed doctrinal structures, one that seeks to determine which structure best promotes the norms and values (moral or otherwise) given force by the Bill of Rights.<sup>155</sup> Fallon acknowledges that this kind of assessment is appropriate for specifying the details of his model, for example, the extent to which rules have severable subrules different from the rules themselves, or the content of rule-validity tests.<sup>156</sup> He should also acknowledge its relevance (indeed, decisiveness) for the more basic choice between his model and my own.

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action that it would fall within the optimal change to the text of  $R$  (for example, an amendment prohibiting "fighting words") and should be sanctioned.

More generally, this kind of case can be readily constructed whenever there is an action such that (1) it is better, in light of constitutional norms, for the actor *not* to be free to perform the action, but (2) the action is covered by an invalid rule that, as it happens, has no valid severable subrules or only ones too limited to encompass the action.

<sup>155</sup> This view is epitomized by the scholarship of Fred Schauer. For one recent example, see Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 119-20 (1998).

<sup>156</sup> See Fallon, *As-Applied and Facial Challenges*, *supra* note 1, section II.C, at 1351-56.